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# Crimes

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## Crimes; 911 calls—intent to annoy or harass

Penal Code § 6531 (new).
AB 2741 (Cannella); 1994 STAT. Ch. 262

Under existing law, it is a misdemeanor[1] to telephone another person with the intent to annoy that person by addressing to or about the other person any obscene[2] language or threat of injury, or by making repeated calls to the other person's residence or place of business.[3]

Chapter 262 provides that it is a misdemeanor to telephone the 911 emergency line with the intent to annoy or harass[4] another person.[5] A violation is punishable

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1. *See* CAL. PENAL CODE § 17(a) (West Supp. 1994) (defining misdemeanor as any crime that is not a felony or an offense classified as an infraction).

2. *See* Miller v. California, 413 U.S. 15, 24 (1973) (defining obscenity as that which appeals to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, does not have serious literary, artistic, political, or scientific value), *reh'g denied*, 414 U.S. 881 (1973); *see also* Sheldon H. Nahmod, *Legal Sampler: Adam, Eve and the First Amendment: Some Thoughts on the Obscene as Sacred*, 68 CHI.-KENT L. REV. 377, 380 (1992) (stating that the assumption that obscenity has little or no value was part of the United States Supreme Court's definition of obscenity). *See generally* Jeanne Fiander, *A Stealthy Encroachment: Obscenity and the Fourth Amendment under* Maryland v. Macon, 36 AM. U. L. REV. 773 (1986) (discussing the United States Supreme Court's evolving definition of obscenity).

3. CAL. PENAL CODE § 653m(a)-(c) (West 1988); *see* Maynard v. State Personnel Bd., 67 Cal. App. 3d 233, 239, 136 Cal. Rptr. 503, 506 (1977) (stating that for the purpose of admitting into evidence a communication over the telephone, it is necessary to require proof of the identity of the individual with whom it is held (quoting People v. Lorraine, 28 Cal. App. 2d 50, 54 (1938))). The identity of the person may be established by proof of recognition of his voice, or by other circumstances that satisfactorily indicate the identity of the individual. *Id.*; *see also* People v. Lampasona, 71 Cal. App. 3d 884, 888, 139 Cal. Rptr. 682, 684 (1977) (holding that California Penal Code § 653m applies only to one who places a telephone call to another and not to a recipient of a telephone call); *cf.* ALA. CODE § 13A-11-8(b)(1) (Supp. 1994) (stating that a person commits the crime of harassing communications, a misdemeanor, if the person, among other things, telephones another addressing to or about the other any lewd or obscene language or threatening physical injury); ALASKA STAT. § 11.61.120(a)-(b) (Supp. 1993) (mandating that it is a misdemeanor to make an anonymous or obscene telephone call or a telephone call that threatens physical injury); FLA. STAT. ANN. § 365.16(1) (West Supp. 1994) (providing that it is a misdemeanor of the second degree to make an obscene, lewd, lascivious, filthy, indecent, or vulgar telephone call to a location at which the person receiving the call has a reasonable expectation of privacy); GA. CODE ANN. § 46-5-21(a)(1) (Michie 1992) (mandating that it is a misdemeanor for any person, by means of telephone communication to make any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent); R.I. GEN. LAWS § 11-35-17 (Supp. 1993) (ordering that it is a misdemeanor to originate a transmission by facsimile machine or telephone to any person for the purpose of using any threatening, vulgar, indecent, obscene, or immoral language); S.D. CODIFIED LAWS ANN. § 49-31-31(1) (1993) (providing that it is a misdemeanor for a person to use a telephone to call another person with intent to terrorize, intimidate, threaten, harass, or annoy such person by using obscene or lewd language or by suggesting a lewd or lascivious act); VA. CODE ANN. § 18.2-427 (Michie 1988) (mandating that it is a misdemeanor for any person to use obscene, vulgar, profane, lewd, lascivious, or indecent language over any telephone or citizens band radio).

4. *See* CAL. PENAL CODE § 6531(b) (enacted by Chapter 262) (providing that intent to annoy or harass can be established by proof of repeated calls over a period of time, however short, that are unreasonable under the circumstances).

5. *Id.* § 6531(a) (enacted by Chapter 262). *Compare id. with* ALA. CODE § 11-98-6(d) (Supp. 1994) (stating that the making of a false alarm or complaint, or knowingly reporting false information using the 911 system, will subject the caller to penalties); IDAHO CODE § 18-6711A(a) (1994) (providing that any person

by up to six months in the county jail, or by a fine of up to $1000, or by both the fine and imprisonment.[6] Chapter 262 further provides that upon conviction, a person will be liable for all reasonable costs incurred by any unnecessary emergency responses.[7] Chapter 262 further mandates that this provision will not apply to calls made in good faith.[8]

INTERPRETIVE COMMENT

Chapter 262 was enacted in order to prohibit annoying or harassing telephone calls to 911 operators.[9] Chapter 262 seeks to prevent this abuse which ties up 911 lines, police, firefighters, and emergency medical services while producing substantial costs for local governments.[10]

*Lisa R. Brenner*

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calling 911, for the purpose of making a false alarm or complaint, and reporting false information that could result in the emergency response of any firefighting, police, medical or other emergency services, is guilty of a misdemeanor); PA. STAT. ANN. tit. 35, § 7020 (1993) (mandating that any person who intentionally calls the 911 emergency number for other than emergency purposes commits a misdemeanor).

6. CAL. PENAL CODE § 6531(a) (enacted by Chapter 262).

7. *Id.* § 6531(c) (enacted by Chapter 262).

8. *Id.* § 6531(a) (enacted by Chapter 262).

9. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2741, at 2 (June 14, 1994).

10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2741, at 2 (March 15, 1994); *see id.* (stating that according to Santa Clara County's Chief Dispatcher, seventy-three 911 calls were made from a specified phone number in a seven-hour period when it was an extremely busy swing/midnight shift); *id.* at 2-3 (stating that in Mariposa, which has only two lines available for 911 incoming calls, one person tied up one of those lines for approximately an hour and a half); *id.* at 3 (stating that the 911 Dispatch Center of Stanislaus reports that existing law was inadequate as its 911 system is frequently abused by individuals who do not have an emergency); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2741, at 3 (June 14, 1994) (reporting that in San Mateo County between March and April of 1992, a few of the calls received involved callers who dialed 911 for reasons including, but not limited to, the following: Wanting a ride home and to talk, asking for directions to San Rafael, wanting the California Highway Patrol to know that a driver had given them the wrong license number, asking for help in calling the prison in Vacaville, reporting a dead cat on the street, asking if a taxi could be sent to take the caller to the airport, and wanting to talk to the Traffic Sergeant regarding a parking ticket); *id.* at 2 (stating that annoying or harassing telephone calls to 911 operators cost local governments several hundred dollars an hour); Ann W. O'Neill, *Street Beat: The Fight Against Crime: Notes from the Front; Proposed Law Would Punish 911 Abusers*, L.A. TIMES, May 25, 1994, at B2 (stating that on an average, the City of Los Angeles receives between 150 and 200 crank calls and therefore it is not surprising that the city is among the chief backers of 911 legislation); *id.* (stating that the Los Angeles Police Department has tried to remedy the problem of callers, without an emergency, making repeated 911 calls by doing the following: Warning them on the phone not to annoy, by contacting these callers at their homes, and by issuing written warnings, but all to no avail).

**Crimes; adult entertainment—local regulation**

Government Code § 65850 (amended).
SB 1863 (Leslie); 1994 STAT. Ch. 597

Existing law provides that the legislative body of any city or county may adopt ordinances that regulate, among other things, signs and billboards, use and size of buildings, land use, and parking requirements.[1] Furthermore, existing law provides that nothing in the Penal Code will invalidate a local ordinance that directly regulates the exposure of the genitals, buttocks, or the breasts of a person who acts as a waitress, waiter, or entertainer.[2]

Chapter 597 allows the legislative body of any city or county to regulate the time, place, or manner[3] of operation of sexually orientated businesses, pursuant to a content-neutral zoning ordinance,[4] when the ordinance is designed to serve a substantial governmental interest, does not unreasonably limit alternative avenues of communication,[5] and is based on narrow, objective, and definite standards.[6] Chapter 597 also authorizes the legislative body to rely on experiences of other counties and cities, including the findings of court cases, in establishing the reasonableness of the ordinance and its relevance to specific problems it

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1. CAL. GOV'T. CODE § 65850 (amended by Chapter 597).
2. CAL. PENAL CODE § 318.5 (West 1988).
3. *See* City of Renton v. Playtime Theatres, 475 U.S. 41, 46 (1986) (defining a time, place, and manner regulation as one that does not ban an activity altogether).
4. *See City of Renton*, 475 U.S. at 48 (defining "content-neutral" speech regulations as those that are justified without reference to the content of the regulated speech (citing Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976))); *see also* Holmberg v. City of Ramsey, 12 F.3d 140, 142-143 (1993) (defining a content-neutral ordinance regulating sexually oriented businesses as one that serves a purpose unrelated to the expressive conduct of the sexually oriented businesses, even though the ordinance may affect those businesses indirectly); Tollis v. San Bernardino City, 827 F.2d 1329, 1332 (9th Cir. 1987) (defining content-neutral speech ordinances as those with the predominate purpose in their enactment as the amelioration of deleterious secondary effects instead of the suppression of first amendment rights (quoting Walnut Properties, Inc. v. City of Whittier, 808 F.2d 1331, 1334 (9th Cir. 1986))).
5. *See* Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1529 (1993) (stating that the possible economic impact on a business is not to be taken into consideration in determining the reasonableness of an alternative location).
6. CAL. GOV'T CODE § 65850(g)(1) (amended by Chapter 597); *see City of Renton*, 475 U.S. at 46 (noting the decision in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), which held that an ordinance providing that no adult motion picture theater may be located within 1000 feet of any residential zone, single or multiple-family dwelling, church, park, or school is a form of time, place, and manner regulation as it does not ban adult theaters altogether); *see also id.* (stating that the Supreme Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment); *id.* at 53-54 (holding that the Renton city ordinance, which leaves some 520 acres, or more than five percent of accessible land in Renton available for adult theaters, allows for reasonable alternative avenues of communication as the First Amendment does not compel the Government to ensure that adult theaters, or any other kind of speech-related business, will be able to obtain sites at bargain prices); Young v. American Mini Theatres, Inc., 427 U.S. 50, 78 (1976) (Powell, J., concurring) (providing that the inquiry for the First Amendment is not concerned with economic impact, but rather the effect of an ordinance upon freedom of expression).

addresses.[7] Moreover, Chapter 597 provides that its provisions do not apply to theaters, concert halls, or similar establishments[8] that are primarily devoted to theatrical performances.[9]

## INTERPRETIVE COMMENT

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . ."[10] This Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment.[11]

When a state government "abridges" freedom of speech through regulation, its rationale for doing so can be placed into two general categories. In the first category, the government is restricting the speech because of its content; in other words, the state is trying to restrict the information or ideas within the speech or the general subject matter.[12] In the second category, the regulation is justified without reference to the content of the regulated speech.[13] In this situation, the government is trying to avoid some other problem unconnected with the speech's content, but the regulation incidentally interferes with communications.[14]

If a court determines that a regulation is "content-based," there is a strong presumption that the regulation is unconstitutional.[15] In this case, the court will subject the regulation to a very rigid level of scrutiny where the regulation will be struck down unless the government can prove that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.[16]

However, if a court determines that a regulation is "content-neutral," where the regulation is justified without reference to the content of the regulated speech, a lower standard of scrutiny will be applied.[17] The regulation will be upheld if the

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7. CAL. GOV'T CODE § 65850(g)(1) (amended by Chapter 597); *see id.* (listing specific problems an ordinance may address as including the harmful secondary effects the business may have on the community and its proximity to churches, schools, residences, establishments where alcohol is served, and other sexually oriented businesses); *see also City of Renton*, 475 U.S. at 50-52 (stating that a city can establish its substantial interest by compiling a record of other cities' experiences with sexually oriented businesses that the city reasonably believes to be relevant to its problem).

8. *See* Theresa Enterprises v. Davis, 81 Cal. App. 3d 940, 948, 146 Cal. Rptr. 802, 806-807 (1978) (discussing the meaning of "theater, concert hall, or other establishment").

9. CAL. GOV'T CODE § 65850(g)(3) (amended by Chapter 597).

10. U.S. CONST. amend. I.

11. Gitlow v. New York, 268 U.S. 652, 666 (1925); *see* U.S. CONST. amend. XIV (providing that ... "nor shall any state deprive any person of life, liberty, or property, without due process of law").

12. Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771 (1976); *see id.* (holding that where a state forbids pharmacists to advertise the prices of prescription drugs because the state is afraid that the public will buy drugs at the lowest price and will therefore receive low quality goods and service, the statute is a content-based restriction).

13. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.47 (4th ed. 1991).

14. *Id.*

15. *City of Renton*, 475 U.S. at 46-47.

16. Widmar v. Vincent, 454 U.S. 263, 270 (1981).

17. NOWAK, *supra* note 13, at § 16.47.

government can prove that the regulation is narrowly tailored to serve a significant government interest and it leaves open ample alternative channels for communication of the information.[18]

Although the distinction between content-neutral and content-based regulations seems fairly straightforward, the United States Supreme Court has wrestled with a group of regulations that are neither purely content-neutral nor content-based because they single out particular speech on the basis of content, but impose only a time, place, or manner restriction, rather than an absolute ban.[19] It is not clear whether these types of "hybrid" regulations are subject to strict scrutiny or a less rigid level of scrutiny.[20]

However, in *City of Renton v. Playtime Theatres*,[21] the Court upheld a "hybrid" ordinance prohibiting any "adult motion picture theater" from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school.[22] The Court, with a six justice majority, held that the Renton city ordinance, although not appearing to fit neatly into either the content-based nor the content-neutral category, should be properly analyzed as a content-neutral regulation because the ordinance was only aimed at the secondary effects of such theaters on the surrounding community.[23]

Once the Court determined that this was a content-neutral ordinance, the ordinance was scrutinized by an "intermediate level of scrutiny." First, the Court found that "in attempting to preserve the quality of urban life," the ordinance was adequately designed to serve a substantial government interest.[24] Second, the Court found that because approximately five percent of the land area around Renton was available for adult theaters, the ordinance allowed for reasonable alternative avenues of communication, even though much of this land was occupied or commercially unviable.[25] Lastly, the Court held that Renton was entitled to rely on the experiences of other cities in enacting its adult theater zoning ordinance, as long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.[26]

After *Renton*, it appears that a zoning ordinance regulating sexually oriented businesses will be upheld as long as the ordinance serves a substantial government interest, and does not unreasonably limit alternative avenues of communi-

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18. Clark v. Community For Creative Non-Violence, 468 U.S. 288, 293 (1984).
19. Andrea Oser, *Motivational Analysis in Light of Renton*, 87 COLUM. L. REV. 344, 345 (1987).
20. *Id.*
21. 475 U.S. 41 (1986).
22. *City of Renton*, 475 U.S. at 44.
23. *Id.* at 47; *see id.* at 48 (stating that according to the Renton City Council, the ordinance was designed "to prevent crime, protect the city's retail trade, maintain property values, and generally [protect] and [preserve] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life").
24. *City of Renton*, 475 U.S. at 50 (quoting Young v. American Mini Theatres, 427 U.S. 50, 71 (1976)).
25. *Id.* at 53-54.
26. *Id.* at 51-52.

cation. Therefore, Chapter 597 codifies the *Renton* holding which provides instruction to local legislative bodies regarding their ability to mandate constitutionally permissible regulations relating to sexually oriented businesses.[27]

*Lisa R. Brenner*

**Crimes; auto theft—Motor Vehicle Theft Prevention Act of 1994**

Insurance Code §§ 1872.8, 1875.15, 1876.2 (amended); Vehicle Code §§ 2413, 10900, 10901, 10902 (new).
SB 1743 (Lockyer); 1994 STAT. Ch. 1248

Existing law, specifically the Motor Vehicle Theft and Motor Vehicle Insurance Fraud Reporting Act,[1] requires insurers[2] to release certain relevant[3] information to an authorized governmental agency[4] concerning motor vehicle[5]

27. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1863, at 1-2 (May 16, 1994); *see id.* at 2 (stating that many local entities are unsure of their ability to regulate sexually oriented businesses).

1. *See* CAL. INS. CODE §§ 1874-1874.6 (West 1993) (setting forth the provisions of the Motor Vehicle Insurance Fraud Reporting Act, and including information release requirements for insurers).
2. *See id.* § 1874.1(d) (West 1993) (defining insurer as the automobile assigned risk plan established pursuant to California Insurance Code § 11620, as well as any insurer writing insurance for motor vehicles or otherwise liable for any loss due to motor vehicle theft or motor vehicle insurance fraud).
3. *See id.* § 1874.1(b) (West 1993) (defining relevant as having a tendency to make the existence of any fact that is of consequence to the investigation or determination of an issue more or less probable than it would be without the information).
4. *See id.* § 1874.1(a) (West 1993) (defining authorized governmental agency as the Department of the California Highway Patrol, the Department of Insurance, the Department of Justice, the Department of Motor Vehicles, the police department of a city, or a city and county, the sheriff's office or department of a county, a law enforcement agency of the federal government, the district attorney of any county, or city and county, and any licensing agency governed by the California Business and Professions Code).
5. *See* CAL. VEH. CODE § 415 (West Supp. 1994) (defining motor vehicle as a vehicle which is self propelled).

theft or insurance fraud.[6] Chapter 1248 provides additional reporting requirements for insurers.[7]

Existing law requires each insurer doing business in the state to pay an annual fee of one dollar for each vehicle that it insures in the state in order to fund increased investigation and prosecution of fraudulent automobile insurance claims.[8] Chapter 1248 provides that the fee will also be used to fund increased investigation and prosecution of economic automobile theft.[9] Chapter 1248 designates the Commissioner of the California Highway Patrol[10] as the statewide

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6. CAL. INS. CODE §§ 1874.2(a)-(b), 1874.6 (West 1993); *id.* §§ 1875.15(b), 1876.2 (amended by Chapter 1248); *see id.* § 1874.2(a)(1)-(4) (West 1993) (setting forth the information that may be included in the release); *id.* § 1874.2(b)(1) (West 1993) (requiring an insurer who knows or reasonably believes it knows the identity of a person who committed a criminal or fraudulent act relating to a motor vehicle theft or motor vehicle insurance claim or has knowledge of such conduct to report such information to specified agencies); *id.* § 1874.6 (West 1993) (requiring every insurer to report covered private passenger automobiles involved in theft or total losses); *id.* § 1875.15(b)(1)-(8) (amended by Chapter 1248) (requiring every member or subscriber, in regard to any category of claim, to report, at a minimum, the name of the claimant, address of the claimant, date of accident or incident, identification of medical provider, property repair vendor, members or subscribers, attorneys representing claimants, if applicable, and a description of the claim); *id.* § 1876.2 (amended by Chapter 1248) (requiring every insurer who receives a bodily injury, medical payment, or uninsured motorist claim made under a policy of auto insurance, as specified, to deposit claim information with a licensed insurance claims analysis bureau or the Automobile Insurance Claims Depository).

7. *Id.* § 1875.15(b)(9)-(12) (amended by Chapter 1248); *see id.* (requiring, in addition to other minimum information to be reported by a member or subscriber to a licensed insurance claims analysis bureau, the following: (1) The claimant's drivers license or California identification card number, (2) claimant's social security number, if known to the insurer, (3) vehicle license numbers, if the claim involves automobile insurance, and (4) vehicle identification number, if known and if the claim involves automobile insurance); *id.* § 1876.2 (amended by Chapter 1248) (requiring every insurer who receives a bodily injury, medical payment, or uninsured motorist claim under a policy of automobile liability insurance to report to a licensed insurance claims analysis bureau or the Automobile Insurance Claims Depository, as specified, claim information, including the following: (1) Claimant's driver's license number, or California identification card number, if applicable, (2) the vehicle license number, (3) the vehicle identification number, and (4) the claimant's social security number if known to the insurer).

8. CAL. INS. CODE § 1872.8(a) (amended by Chapter 1248).

9. *Id.* § 1872.8 (amended by Chapter 1248), CAL. VEH. CODE § 10901 (enacted by Chapter 1248); *see* CAL. INS. CODE § 1872.8(a) (amended by Chapter 1248) (designating 15% of the 95 cents remaining of the insurer's fee after incidental expenses, to be deposited in the Motor Vehicle Account for appropriation to the Department of the California Highway Patrol for enhanced prevention and investigative efforts to deter economic automobile theft, and 51% to be distributed to district attorneys for purposes of investigation and prosecution of automobile insurance fraud cases, including fraud involving economic automobile theft); *id.* § 1872.8(f)(1)-(4) (amended by Chapter 1248), CAL. VEH. CODE § 10901(c)(1)-(4) (enacted by Chapter 1248) (defining economic automobile theft as theft of a motor vehicle for financial gain, reporting that a motor vehicle has been stolen for the purpose of filing a false insurance claim, engaging in motor vehicle chop shop activities prohibited by California Vehicle Code §§ 10801-10804, or the switching of vehicle identification numbers to obtain title to a stolen motor vehicle); *see also id.* §§ 10801-10804 (West Supp. 1994) (setting forth provisions prohibiting the operation of a motor vehicle chop shop and related activities); *cf.* MICH. COMP. LAWS ANN. § 500.6101(c) (West 1993) (defining economic automobile theft as automobile theft perpetrated for financial gain); *id.* § 500.6107(1)-(2) (West 1993) (providing that each insurer engaged in writing insurance coverage in Michigan must pay to the Automobile Theft Prevention Authority an assessment fee of $1 multiplied by the insurer's total earned car years of insurance to be placed in the automobile theft prevention fund).

10. *See* CAL. VEH. CODE § 2107 (West 1987) (providing that the Department of the California Highway Patrol is under the control of a civil executive officer, known as the Commissioner of the California Highway Patrol); *id.* (providing that the Commissioner is appointed by the Governor); *id.* § 2108 (West 1987) (setting forth the powers and duties of the Commissioner); *see also id.* §§ 2400-2427 (West 1987 & Supp. 1994)

coordinator for vehicle theft investigation and apprehension, and specifies the duties attached to the position.[11] Chapter 1248 also enacts the Motor Vehicle Theft Prevention Act of 1994 for increased prevention and investigation of economic automobile theft.[12] Chapter 1248 specifies certain funding and reporting requirements for the Act.[13] Finally, Chapter 1248 requires the California Highway Patrol to establish a program designed to prevent and reduce the incidence of economic auto theft.[14]

## INTERPRETIVE COMMENT

According to recent FBI statistics, California has the second highest rate of auto theft per 100,000 people in the nation, with 320,112 auto thefts occurring in 1992 alone.[15] Auto theft has risen 81% in the last seven years in California.[16] By

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(setting forth the powers and duties of the Department of Highway Patrol, to be carried out under the control of the Commissioner, including law enforcement, patrol of highways, creating patrol districts and branch offices, and suspension or revocation of permits).

11. *Id.* § 2413 (enacted by Chapter 1248); *see id.* (providing that the Commissioner may establish vehicle theft prevention, investigation, and apprehension programs, may assist local, state, and federal law enforcement agencies in multi-jurisdictional vehicle theft investigations, and may establish programs to improve the ability of law enforcement to combat vehicle theft).

12. *Id.* §§ 10900-10902 (enacted by Chapter 1248); *cf.* MICH. COMP. LAWS ANN. § 500.6103(1) (West 1993) (creating the automobile theft prevention authority).

13. CAL. VEH. CODE § 10901(b) (enacted by Chapter 1248); *see id.* (authorizing the Commissioner of the Department of the California Highway Patrol to use the proceeds received from the assessment imposed under § 1872.8 of the California Insurance Code to fund the following: (1) Local law enforcement agencies for enhanced investigative efforts and theft prevention efforts; (2) a program directed at investigating and interdicting the export of stolen motor vehicles and components across the California border; and (3) the operation of CAL H.E.A.T. (Californians Help Eliminate Auto Theft) program); *id.* (requiring the Commissioner to submit an annual report to the Legislature accounting for all funds received and dispersed); *id.* § 10902 (enacted by Chapter 1248) (providing that in the annual report, the Commissioner must report on the results of the CAL H.E.A.T. program, including the number of calls from the public reporting a suspected motor vehicle theft, the number of arrests, complaints filed, convictions, and vehicles recovered, and the amount or property losses saved as a result of the program); *cf.* MICH. COMP. LAWS ANN. § 500.6105 (West 1993) (setting forth the powers of the automobile theft prevention authority including making grants of the funds it receives); *id.* § 500.6107 (West 1993) (providing that the money received from the assessment fee imposed upon insurers must be used to provide financial support to state police and state and local law enforcement agencies programs designed to reduce the incidence of economic auto theft).

14. CAL. VEH. CODE § 10902 (enacted by Chapter 1248); *see id.* (requiring the Department of the California Highway Patrol to establish a program entitled CAL H.E.A.T. for the purpose of reducing the incidence of economic car theft in California and declaring that the program will be an anti-auto theft program with a toll-free hotline operator who will channel reports from the public regarding auto thefts to state and local law enforcement agencies); *id.* (stating that if funded by admitted insurers in the state, the program may offer rewards for reports that lead to the arrest and conviction of a person engaged in economic automobile theft). *See generally* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1743, at 4 (May 26, 1994) (stating that Michigan's anti-theft program, H.E.L.P., funds a hot-line operator who channels tips to task force teams and offers rewards to persons providing information which puts auto thieves in jail and stating that from October, 1985 through August, 1993, H.E.L.P. received 3368 tips which led to the recovery of 1642 vehicles with an estimated value of $17.7 million and with $1,053,000 being paid out in rewards).

15. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1743, at 3 (May 26, 1994); *see id.* (stating that in 1990, comprehensive coverage for auto theft losses accounted for 12% of the automobile insurance dollars paid out that year, totalling $1.3 billion); *id.* at 4 (stating that auto theft has reached epidemic proportions in the City of Los Angeles). *See generally* Sebastian Rotella, *Mexico Drug Cops Go to War in Stolen U.S. Yupmobiles,*

enacting Chapter 1248, the Legislature seeks to solve California's auto theft problem by providing increased funds for the prevention of economic auto theft.[17] Michigan passed a similar economic auto theft program in 1985, and has since then seen a 23% reduction in auto thefts overall.[18]

*Darren K. Cottriel*

## Crimes; cruelty to nonambulatory animals

Penal Code § 599f (new).
SB 692 (Roberti); 1994 STAT. Ch. 600

Existing law generally prohibits cruelty[1] to animals and specifically prohibits transporting any animal in an inhumane manner.[2] Under Chapter 600, it is a

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SACRAMENTO BEE, May 23, 1994, at A1 (reporting on the current controversy regarding Mexican officials and drug runners using stolen automobiles from the United States, specifically Suburbans, Jeep Cherokees, and Ford Explorers, and that about 10% of the 34,000 vehicles stolen in San Diego last year ended up going south to Mexico).

16. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1743, at 3 (May 26, 1994); *see* Mareva Brown, *County Car Thefts Stuck in High Gear, Steady Rise to 16,000 Cases in '93*, SACRAMENTO BEE, Apr. 6, 1994, at A1 (reporting that in 1993, 16,000 vehicles were reported stolen in Sacramento County, an increase of 34% since 1989); Jesse Katz, *Auto Thefts Skyrocket Throughout Region*, L.A. TIMES, Nov. 23 1989, at J1 (reporting that from 1984 to 1988, 15 San Gabriel Valley cities have experienced more than a 100% increase in their rate of auto theft); *Anti-Theft CHP Truck is Stolen*, SACRAMENTO BEE, May 22, 1993, at B4 (reporting that an unmarked California Highway Patrol truck used to fight auto theft was stolen from outside an officer's house in Stockton).

17. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1743, at 3 (May 26, 1994).

18. *Id.*; *see id.* (stating that in 1985, the FBI ranked Michigan as the state with the second highest auto theft rate, but that by 1992, Michigan had dropped to fifteenth place in that category); *id.* at 4 (stating that in 1992, automobile theft prevention authority funded programs successfully recovered 2221 stolen vehicles worth an estimated $18,559,000, with 2190 individuals being arrested); *see also Just in Passing*, DET. FREE PRESS, Mar. 17, 1994, at F1 (reporting that 58,037 cars and trucks were stolen in Michigan in 1992, down from 72,021 in 1986); *Michigan Authority Helps Clamp Down on Auto Thefts*, MIAMI HERALD, Apr. 7, 1994, at 9B (reporting that tough auto theft laws in Michigan and Illinois are driving car thieves into Indiana, resulting in a dramatic increase in the number of auto thefts in that state and forcing legislators to consider passing legislation modeled after Michigan law).

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1. *See* CAL. PENAL CODE § 599b (West 1988) (defining cruelty as any act, omission, or neglect causing or permitting needless and unjustifiable physical pain or suffering).

2. *Id.* §§ 597(a)-(b), 597a (West 1988 & Supp. 1994); *see id.* § 597(a)-(b) (West Supp. 1994) (prohibiting any person from being cruel to an animal, including, *inter alia*, cruelly killing any animal, subjecting any animal to unnecessary suffering, and depriving any animal of necessary sustenance); *id.* § 597a (West 1988) (prohibiting any person from transporting a domestic animal by inhumane means); *see also* CAL. FOOD & AGRIC. CODE § 16908 (West 1986) (requiring an animal to be unloaded in a humane manner into a sufficiently equipped pen in order to rest, be fed, and obtain water for a minimum of five hours after being confined in a truck for transit purposes for over 28 hours); Norton v. State, 820 S.W.2d 272, 273-74 (Ark. 1991) (upholding the conviction of a defendant charged with cruelty to animals where the animals on her premises were malnourished, and the goats had such long hooves that it was less painful for them to walk on

misdemeanor[3] for non-federally inspected slaughterhouses, stockyards, or auctions to buy, sell, or receive nonambulatory[4] animals.[5]

Chapter 600 prohibits slaughterhouses, stockyards, auctions, market agencies, or dealers from holding nonambulatory animals without taking immediate action to either humanely euthanize[6] the animal or remove it from the premises.[7] Chapter 600 also sets forth requirements relating to the movement of nonambulatory

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their knees); *cf.* MISS. CODE ANN. § 97-41-5 (1973) (providing that cruelty to animals includes carrying them in a cruel manner, confining them without food or water, and failing to provide sustenance); N.J. STAT. ANN. § 4:22-17(c) (West 1991) (prohibiting cruelty to animals, defining cruelty as, *inter alia*, needlessly failing to provide an animal with proper food, drink, shelter, or protection); OHIO REV. CODE ANN. § 3717.12 (Anderson 1992) (prohibiting any person from keeping a dairy cow in a cramped or unhealthy condition); State v. Walker, 236 N.W.2d 292, 296 (Iowa 1975) (affirming the conviction of two brothers who failed to give their cattle food, water, and shelter, and neglected to dispose of dead cattle within 24 hours); People v. Olary, 170 N.W.2d 842, 844-45 (Mich. 1969) (upholding a conviction where the evidence showed that the defendant cruelly allowed his cow to suffer from puncture wounds which were apparently caused by a pitchfork). *But see* MONT. CODE ANN. § 45-8-211(4) (1993) (excepting from animal cruelty provisions commonly accepted agricultural and livestock practices on livestock); N.J. STAT. ANN. § 4:5-50 (West 1991) (stating that marking a cow to show that it has been condemned for tuberculin reasons does not constitute cruelty to animals); *id.* § 4:5-53.4 (West 1991) (providing that marking cattle at an auction market does not constitute cruelty to animals); 18 PA. CONS. STAT. ANN. § 5511(c) (Supp. 1994) (defining cruelty as , *inter alia*, depriving any animal of necessary veterinary care, but excepting activity undertaken in normal agricultural operation). *See generally* Sonja A. Soehnel, Annotation, *What Constitutes Offense of Cruelty to Animals—Modern Cases*, 6 A.L.R.5TH 733 (1993) (discussing modern statutory enactments regarding animal cruelty).

3. *See* CAL. PENAL CODE § 17 (West Supp. 1994) (defining a misdemeanor).

4. *See id.* § 599f(e) (enacted by Chapter 600) (defining nonambulatory as not having the capacity to walk or stand without assistance).

5. *Id.* § 599f(a) (enacted by Chapter 600); *see id.* § 599f(f) (enacted by Chapter 600) (defining animal as cattle, swine, goats, or sheep); *see also* Bosma v. United States Dep't of Agric., 754 F.2d 804, 806 (9th Cir. 1984) (discussing the sale of sick and distressed cows by a market agent for slaughter); *cf.* MASS. GEN. LAWS ANN. ch. 129, § 9 (West 1991) (providing that representatives from the Massachusetts Society for the Prevention of Cruelty to Animals have the right to inspect all premises where animals, such as cattle, sheep, or swine, are delivered for transportation or are slaughtered in order to prevent violations of the law, including animal cruelty); MISS. CODE ANN. § 97-41-15(1) (Supp. 1993) (providing that any person who maliciously hurts or kills a livestock animal such as a sheep, cow, or hog, will be fined up to $300 or imprisoned up to six months, or both); OHIO REV. CODE ANN. § 959.13(3) (Anderson 1988) (prohibiting animals from being carried or transferred in an inhumane way); PA. STAT. ANN. tit. 3, § 451.11 (1991) (prohibiting the sale of animals that are in a dying condition when destroyed); TEX. PENAL CODE ANN. § 42.11(a)(4) (West 1989 & Supp. 1994) (providing that transporting or confining an animal in an inhumane manner constitutes cruelty to animals); State v. Chiantella, 518 So.2d 1056, 1057 (La. Ct. App. 1987) (holding that where 14 counts of cruelty to a cow, in violation of Louisiana law, are joined in one information, the maximum penalty against the defendant is a $500 fine and/or six months in prison). *See generally HSUS Investigation Reveals Need for 'No Downer' Policy At Stockyards*, PR Newswire, Washington Dateline, Mar. 5, 1992, *available in* LEXIS, News File, Arcnws File (indicating the need for a policy to protect downed animals in stockyards nationwide); *Downed Animal Act Will Held End Suffering*, BUFF. NEWS, Apr. 18, 1993, at 8 (explaining the effect of the Downed Animal Protection Act introduced in the United States Congress).

6. *See* CAL. PENAL CODE § 599f(g) (enacted by Chapter 600) (defining humanely euthanized as causing an easy death by some means that quickly and effectively makes the animal feel no pain).

7. *Id.* § 599f(b) (enacted by Chapter 600); *see* 7 U.S.C.A. §§ 1901-1906 (West 1982) (setting forth the provisions of the Humane Methods of Slaughter Act); *id.* § 1902(a) (West 1982) (providing that humane methods of slaughter include all methods that render animals insensible to pain and are rapid and effective); *cf.* 9 C.F.R. § 313.2 (1993) (providing requirements for humane slaughter and the handling of livestock); N.J. STAT. ANN. § 4:22-20 (West Supp. 1994) (prohibiting the abandonment of a sick, infirm, or disabled animal in a public place to die).

animals, mandating that nonambulatory animals be moved with a sling or a stone-boat or other sled-like or wheeled conveyance.[8]

INTERPRETIVE COMMENT

In enacting Chapter 600, the Legislature intended to prevent the suffering of animals too sick or too weak to walk.[9] Cruel and inhumane treatment of downed animals at slaughterhouses and stockyards has been exposed as a problem that warrants legislative action.[10]

*Laura J. Fowler*

## Crimes; disposition of exhibits used in criminal trials

Penal Code § 1417.6 (amended).
AB 3653 (Epple); 1994 STAT. Ch. 488

Existing law provides for the disposition of evidence used in a criminal proceeding once the proceedings are finalized.[1] Chapter 488 amends existing law

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8. CAL. PENAL CODE § 599f(c) (enacted by Chapter 600); *see id.* (specifying that requirements related to movement of nonambulatory animals are applicable while animals are in transit or while being held on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse); *id.* (providing that nonambulatory animals may not be dragged or pushed with equipment at any time); *see also Food Company is Cited in Animal Mistreatment*, CHI. TRIB., Sept. 17, 1992, at 3 (stating that charges of intentional animal mistreatment and intentional cruel transportation of an animal were filed against Peck Foods Corp. for utilizing a front-end loader to push animals too weak to walk into the slaughterhouse); *cf.* N.J. STAT. ANN. § 4:22-18 (West 1991) (prohibiting the carrying of an animal in a cruel or inhumane manner).

9. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 692, at 2 (Feb. 18, 1994); *see id.* (stating that since moving downed animals is difficult, they are often dragged by winches or pushed with fork-lifts, procedures that can cause serious injuries and result in unnecessary suffering); *id.* (stating that this measure will outlaw the prolonged suffering which downed animals are currently made to endure and will prevent cruel handling methods such as dragging); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 692, at 4 (July 13, 1993) (stating that opponents of the bill argue that it will create a black market and that the costs of implementing it will prove to be prohibitive).

10. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 692, at 2 (Feb. 18, 1994); *see* Howard Rosenberg, *A Prize for a Video Muckraker*, L.A. TIMES, Oct. 23, 1991, at F1 (discussing a woman who used her video recorder to expose appalling cruelty inside a South St. Paul, Minnesota stockyard). *See generally* 139 CONG. REC. S1603 (daily ed. Jan. 5, 1993) (statement of Mr. Akaka) (discussing the introduction of a federal law that would amend the Packers and Stockyards Act and would make it unlawful to transfer or market nonambulatory livestock); *id.* (stating that the suffering of downed animals is so severe that the only humane solution is immediate euthanasia); *id.* (stating that downed animals comprise such a minute percentage of animals at stockyards that banning their sale would cause no economic hardship).

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1. CAL. PENAL CODE § 1417.5 (West Supp. 1994); *see id.* (providing that 60 days after a criminal proceeding has ended, all exhibits must be released to the owner upon request, or destroyed, sold, or retained by the county for public use).

by providing that any tool or device that was used in the commission of specified crimes may be deemed a nuisance and may be subject to an evidentiary hearing.[2] At the hearing, the State must prove by a preponderance of the evidence that the property in question is of a type used in aiding in the commission of the defendant's crime.[3] To avoid having the property declared a nuisance, the owner must prove that he or she owns the property and was unaware or did not consent to its unlawful use.[4] If the property is declared a nuisance, it will be disposed of in accordance with California Penal Code section 1417.5.[5]

## INTERPRETIVE COMMENT

Chapter 488 was enacted out of concern that an owner of tools used in committing vehicle theft or in operating a chop shop was legally entitled to request the return of his or her equipment after being convicted of a crime, if possession of the equipment was legal to possess.[6] Under Chapter 488, the materials that are used to commit certain crimes involving vehicles, and that are

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2. *Id.* § 1417.6(b)(1) (amended by Chapter 488); *see id.* (mandating that California Penal Code § 1417.5 applies to any tools used in the violation of California Vehicle Code §§ 10801, 10802, and 10803); *id.* § 1417.6(b)(2) (amended by Chapter 488) (providing that an evidentiary hearing will be held only if the defendant is convicted and receives notice of the hearing); *see also id.* § 10801 (West Supp. 1994) (prohibiting the ownership and operation of a chop shop); *id.* § 10802 (West Supp. 1994) (prohibiting alteration of vehicle identification numbers); *id.* § 10803 (West Supp. 1994) (prohibiting the purchase or possession for the purpose of sale of more than one motor vehicle or parts from more than one motor vehicle with the knowledge that the vehicle identification numbers have been changed or removed).

3. CAL. PENAL CODE § 1417.6(b)(2) (amended by Chapter 488).

4. *Id.* § 1417.6(b)(3) (amended by Chapter 488).

5. *Id.* § 1417.6(b)(4) (amended by Chapter 488); *see id.* § 1417.5(b)(1) (West Supp. 1994) (providing that stolen or embezzled property must be disposed of according to California Penal Code § 1417.6); *id.* § 1417.5(b)(2) (providing that property which is not stolen or embezzled and which is not money or currency must be disposed of pursuant to certain sections of the California Government Code, or retained by the county for public use); *id.* § 1417.5(b)(3) (West Supp. 1994) (providing for the destruction of property that is not money or currency, or stolen or embezzled, and of no value at public sale); *id.* § 1417.6(a) (amended by Chapter 488) (providing that certain property may be either destroyed or disposed of pursuant to the conditions of a court order); *see also* CAL. GOV'T CODE § 25504 (West 1988) (providing for the sale of county property, and for the deposit of the proceeds from the sale into the county treasury); *id.* § 25505 (providing for the sale of district property, and for the deposit of the proceeds from the sale into the district's treasury).

6. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 3653, at 2 (Apr. 19, 1994); *see* CAL. PENAL CODE § 1417.5 (West Supp. 1994) (stating that certain exhibits used in a criminal proceeding that do not prejudice the State or are not stolen or embezzled property may be returned to any owner or person entitled to their possession); CAL. VEH. CODE § 250 (West Supp. 1994) (defining chop shop as any premises at which any person has been engaged in altering any illegally obtained motor vehicle or motor vehicle part in order to either prevent its identification or to sell); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3653, at 3 (June 28, 1994) (reporting on a specific incident in which a defendant, who had received a six year sentence, would have been given back his chop shop tools, if not for a plea bargain in which he agreed to give up his tools). *See generally* Art Campos, *Two Helped Thwart Car Theft*, SACRAMENTO BEE, Aug. 11, 1993, at B3 (reporting that in California, in 1992, 315,456 vehicles worth approximately $1.7 billion were stolen, and that although 90% of the vehicles were recovered, many had been stripped or destroyed); *id.* (reporting that while 88.4% of all vehicles stolen in California were recovered, only 47% were in drivable condition, and 26% were stripped of parts to some degree); *id.* (listing vehicle theft statistics by geographical area); Chau Lam, *Fire Fails to Hide the Evidence: Hot Cars*, L.A. TIMES, Apr. 30, 1994, at Metro 4 (reporting on the discovery of a profitable chop shop).

otherwise legal to possess, may be declared a nuisance and disposed of pursuant to California Penal Code section 1417.5.[7]

*Maria V. Daquipa*

## Crimes; disruption of religious meetings

Penal Code § 302 (amended).
AB 3103 (Ferguson); 1994 STAT. Ch. 401

Under prior law, every person who wilfully[1] disturbed or disquieted any assemblage of people gathered for religious worship at a tax-exempt place of worship was guilty of a misdemeanor[2] punishable by a fine not exceeding one thousand dollars, or by imprisonment in the county jail for a period not exceeding six months, or by both fine and imprisonment.[3] Prior law also allowed a court to require performance of community service as an alternative to imprisonment or a fine.[4] Upon a conviction for disturbance of religious worship, existing law

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7. CAL. PENAL CODE § 1417.6(b)(1) (amended by Chapter 488); *see id.* (permitting any tool or device seized and of a type used in the commission of specified crimes to be deemed a nuisance); *id.* § 1417.5 (West Supp. 1994) (providing for the disposition of exhibits used in criminal actions or proceedings).

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1. *See* CAL. PENAL CODE § 7 (West 1988) (defining wilfully as a purpose or willingness to commit an act or make an omission); *id.* (asserting that the term does not require any intent to violate law, to injure another, or to acquire any advantage).

2. *See id.* § 17(b) (West Supp. 1994) (mandating that when a crime is punishable, in the discretion of the court, by imprisonment in the state prison, by fine, or by imprisonment in the county jail, it is a misdemeanor for all purposes under various circumstances enumerated in this section); *id.* § 19 (West 1988) (defining misdemeanor punishments by the following standard: Except in cases where a different punishment is prescribed by any law of the state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding $1000, or by both).

3. 1990 Cal. Stat. ch. 822, sec. 1, at 92 (amending CAL. PENAL CODE § 302); *see id.* (listing as examples of disturbances profane discourse, rude or indecent behavior, or any unnecessary noise, either within the place where the meeting is held, or so near it as to disturb the order and solemnity of the meeting); People v. Cruz, 25 Cal. App. 3d Supp. 1, 10-12, 101 Cal. Rptr. 711, 717-18 (1972) (discussing the legal ramifications when a group of 300 persons marched, chanted slogans, and broke into a church during the celebration of Midnight Mass on Christmas Eve, and holding the following: (1) Defendants convicted under California Penal Code § 302 could not successfully assert the unconstitutionality of the statute on grounds of overbreadth or vagueness, and the wording of the statute gave the defendants fair notice of its dictates; (2) although the statute may restrain freedom of speech indirectly or incidentally by prohibiting rude behavior or unnecessary noise, there is no question of the validity of enactments that restrain speech which is otherwise the legitimate object of the police power (citing Cox v. Louisiana, 379 U.S. 536 (1965))).

4. 1990 Cal. Stat. ch. 822, sec. 1, at 92 (amending CAL. PENAL CODE § 302); *see id.* (providing that the following penalties will apply: (1) The first offense requires performance of community service of not less than 20 hours and not exceeding 40 hours; (2) a second conviction mandates the performance of community service of not less than 40 hours and not exceeding 80 hours; and (3) the third conviction, and for subsequent convictions thereafter, requires the performance of community service of not less than 80 hours and not exceeding 120 hours); *see also* CAL. PENAL CODE § 302(d)(1)-(4) (amended by Chapter 401) (requiring that

allows a court to order the defendant to perform a portion or all of the required community service at the place where the disturbance of religious worship occurred.[5] Chapter 401 instead provides that when a person intentionally[6] disturbs or disquiets an assemblage of people gathered for religious worship at a tax-exempt place of worship, he or she may be sentenced by imprisonment not exceeding one year.[7] Chapter 401 also increases the minimum and subsequent community service hours punishing the offense of disturbing a religious meeting.[8]

## INTERPRETIVE COMMENT

Chapter 401 was enacted to serve as a deterrent against outrageous acts of religious disturbances.[9] Historically, the definition of a disturbance has varied

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the existence of any fact which would bring a person under mandatory community service provisions must be alleged in the complaint, information, or indictment and be either: (1) Admitted by the defendant in open court; (2) found to be true by a jury trying the issue of guilt; (3) found to be true by the court where a plea of guilty or nolo contendere establishes guilt; or (4) found to be true in a trial by the court in which a jury is not sitting); *id.* § 403 (West 1988) (providing generally that every person who, without authority of law, wilfully disturbs or breaks up any assembly or meeting not unlawful in its character, is guilty of a misdemeanor).

5. CAL. PENAL CODE § 302(e) (amended by Chapter 401); *see id.* (asserting that such a decision must be consistent with public safety interests and with the victim's consent); *see also id.* § 302(f) (amended by Chapter 401) (granting the court power to waive the mandatory minimum requirements for community service whenever it is in the interest of justice to do so). When a waiver is granted, the court must state on the record all its reasons for supporting the waiver. *Id.*

6. *See id.* § 21(a) (West 1988) (defining intent or intention by reference to the manifested circumstances connected with the offense); *id.* § 21(b) (West 1988) (providing that in the guilt phase of a criminal action or a juvenile adjudication hearing, evidence that the accused lacked the capacity or ability to control his conduct for any reason is not admissible on the issue of whether the accused actually had any mental state with respect to the commission of any crime); *id.* § 26 (West 1988) (listing as exceptions to California Penal Code § 21(b) the following classes of persons: (1) Children under the age of 14, in the absence of clear proof that at the time of committing the act charged, they knew its wrongfulness; (2) idiots; (3) persons who committed the act or made the omission out of ignorance or under a mistake of fact, which disproves any criminal intent; (4) persons who committed the act charged without being conscious thereof; (5) persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence; and (6) persons (unless the crime is punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and actually did believe their lives would be endangered if they refused); *cf.* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1334 (1989) (advocating the belief that an actor should be excused only if that person attained or reflected society's legitimate expectations of moral strength).

7. CAL. PENAL CODE § 302(a) (amended by Chapter 401).

8. *Id.* § 302(b) (amended by Chapter 401); *see id.* (granting the court discretion to require performance of community service of not less than 50 hours and not exceeding 80 hours as an alternative to imprisonment or fines for the first offense); *id.* § 302(c) (amended by Chapter 401) (mandating that a second or subsequent offense will require performance of community service of not less than 120 hours and not exceeding 160 hours); *id.* (applying the same rules in the event of an earlier conviction or convictions under California Penal Code § 403); *id.* § 403 (West 1988) (declaring that every person who, without authority of law, wilfully disturbs or breaks up any assembly or meeting, not unlawful in its character, is guilty of a misdemeanor).

9. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 3103, at 2 (May 31, 1994); *see id.* (recognizing several instances throughout the state where groups of people have congregated in front of churches and prevented parishioners from attending Sunday services); *id.* (describing other occasions during which people have disrupted church meetings by shouting, blowing whistles, and pounding on church doors, all to disrupt services); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 3103, at 2 (Apr. 19, 1994)

somewhat, based on the nature and character of each particular kind of meeting and the purposes for which it was held.[10] Chapter 401 will probably have the effect of preserving the sanctity of the religious experience to a greater extent, and this result is consistent with statutes from other states and the precedent of past cases.[11]

*Joseph A. Tommasino*

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(discussing an incident where homosexual demonstrators began gathering around church property before a riot ensued that resulted in injuries, fear, and verbal abuse inflicted by the demonstrators).

10. *See* Annotation, *Conduct Amounting to Offense of Disturbing Public or Religious Meeting*, 12 A.L.R. 650, 650-56 (1921) (listing, among others, such types of disturbances as cracking and eating pecans in church during services, swearing and fighting after a congregation had been dismissed, threatening to take the life of any person attempting to enter a church, firing off a pistol at night for the purpose of amusement within 100 yards of an assembled congregation, and interrupting a minister while he was speaking to argue with him about a statement made in the course of a sermon).

11. *See* D.C. CODE ANN. § 22-1114 (1989) (prohibiting a person from molesting or disturbing any congregation engaged in any religious exercise or proceedings in any church or place of worship); MICH. COMP. LAWS ANN. § 91.1 (West 1991) (giving cities the general power and authority to prevent and punish violations of the Sabbath day and the disturbance of any religious meeting); *id.* § 752.525 (West 1991) (broadening the scope of a disturbance to include the sale of liquor, wine, beer, cider, fruit, or other article of food within 2 miles of the place where assembly for religious worship is occurring); NEV. REV. STAT. ANN. § 201.270 (Michie 1992) (expanding the notion of a disturbance to encompass the exhibition of shows or plays, or the promotion of the racing of animals, or gaming of any description); N.M. STAT. ANN. § 30-13-1 (Michie Supp. 1994) (giving the ordinary meaning of "disturbing," thus defining it as throwing into disorder or confusion, or interrupting); OKLA. STAT. ANN. tit. 21, § 916 (West 1983) (deeming as a disturbance the obstruction in any manner, without authority of law, of the free passage along any highway to the place of a religious meeting); S.D. CODIFIED LAWS ANN. § 22-27-1 (1988) (condemning the intentional prevention, by threats or violence, of another person's performance of a lawful act enjoined upon or recommended to such person by his religion); Riley v. District of Columbia, 283 A.2d 819, 825 (D.C. Cir. 1971) (holding that a legitimate governmental interest exists in protecting freedom of worship as well as the maintenance of peace and good order in the community, and that a prohibition of disturbances directed at religious meetings does not impinge upon First Amendment freedoms), *cert. denied*, 405 U.S. 1006 (1972); Scougale v. Sweet, 82 N.W. 1061, 1063 (Mich. 1900) (advocating punishment of an individual who disturbs a religious meeting since such punishment serves to deter a spirit of insubordination from being created and fostered among men); *see also* Reynolds v. Tennessee, 414 U.S. 1163, 1167-69 (1974) (Douglas, J., dissenting) (speculating that a state can constitutionally protect religious congregations from unwanted and disruptive intrusions even though societal norms of appropriate conduct vary with the nature of the meeting, but where a state statute serves this function and is capable of interpretation reaching expression protected by the First Amendment, the greatest precision is required); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 371 (9th ed. 1988) (stating that the First Amendment to the Federal Constitution declares that Congress shall make no law prohibiting the free exercise of religion, and that the California Constitution (CAL. CONST. art. 1, § 4 ) is broader since it provides for the free exercise and enjoyment of religion without discrimination or preference).

**Crimes; domestic violence—Battered Women Protection Act**

Health and Safety Code § 300.5 (new).
AB 167 (B. Friedman); 1994 STAT. Ch. 140
*(Effective July 9, 1994)*

Existing law establishes the Spousal Abuser Prosecution Program[1] providing for the award of funds to counties and cities for the prosecution of perpetrators of domestic violence[2] offenses.[3]

Chapter 140, known as the Battered Women Protection Act of 1994,[4] expands the existing prosecution program by requiring the Maternal and Child Health Branch[5] of the State Department of Health Services[6] to administer a comprehensive domestic violence program that includes a grant program for battered women's shelters such as those found in several other states.[7]

Chapter 140 additionally establishes an advisory council for the purpose of providing consultation to the State Department of Health Services regarding

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1. *See* CAL. PENAL CODE §§ 273.8-273.87 (West 1988 & Supp. 1994) (establishing the Spousal Abuser Prosecution Program in the Office of Criminal Justice Planning).

2. *See* CAL. FAM. CODE § 6211 (West 1994) (defining domestic violence as abuse of a spouse or former spouse, a cohabitant or former cohabitant, a dating partner, a fiancé or fiancée, a person with whom the abuser has had a child, a child of the abuser, or any other person related by consanguinity or affinity); *see also* CAL. PENAL CODE § 273.5(a) (West 1988) (providing that anyone who willfully inflicts corporal injury resulting in a traumatic condition upon a spouse or cohabitant of the opposite sex will be guilty of a felony punishable by imprisonment in a state prison or county jail). *See generally* Loraine P. Eber, Note, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895, 905-11 (1981) (discussing the problem of wife battering and the inadequacies of existing criminal remedies).

3. CAL. PENAL CODE § 273.81(a)-(c) (West 1988); *see id.* (providing for the administration and disbursement of funds appropriated to the Office of Criminal Justice Planning to county district attorneys or city attorneys in regions containing spousal abuser prosecution units); *see also id.* § 273.81(d) (West 1988) (requiring that local governments provide 20% matching funds for grants awarded under the program).

4. *See* 1994 Cal. Legis. Serv. ch. 140, sec. 1, at 1095 (establishing the Battered Women Protection Act of 1994).

5. *See* CAL. HEALTH & SAFETY CODE § 300 (West 1990) (establishing the Maternal and Child Health Branch of the State Department of Health Services).

6. *See id.* § 100 (West 1990) (establishing the State Department of Health Services within the California State Health and Welfare Agency); *see also id.* § 103 (West 1990) (defining the purposes, duties, powers, and responsibilities of the State Department of Health Services).

7. *Id.* § 300.5(a) (enacted by Chapter 140); *see* CAL. HEALTH & SAFETY CODE §300.5(b) (enacted by Chapter 140) (providing for grants to battered women's shelters provided they propose to expand their existing services or create new services in any of four enumerated areas: (1) Emergency shelters for women and their children; (2) transitional housing to help women find employment as well as permanent housing for themselves and their children; (3) legal and other representation; and (4) other support services identified by the advisory counsel created by Chapter 140); *see e.g.*, ILL. ANN. STAT. ch. 20, para. 2210 (Smith-Hurd 1993) (establishing the Domestic Violence Shelters Act providing a comprehensive program of not-for-profit domestic violence shelters with concomitant funding); MICH. COMP. LAWS ANN. §§ 400.1501-1510 (West 1988 & Supp. 1994) (establishing a specially funded domestic violence program); MISS. CODE ANN. §§ 93-21-103, 117 (1993) (establishing a shelter-based program for victims of domestic violence as well as funding known as the Victims of Domestic Violence Fund); WASH. REV. CODE ANN. §§ 70.123.010-900 (West 1992) (establishing a fully-funded shelter program for victims of domestic violence); *see also* Eber, *supra* note 2, at 916 (stating that shelters are increasingly used to provide refuge to battered women).

implementation of the grant program established by Chapter 140.[8] Chapter 140 further requires the Department to work in close collaboration with the advisory council in determining the allocation of appropriated funds as well as the solicitation of proposals from potential grant recipients.[9]

Chapter 140 declares that it is the intent of the Legislature to fund the Spousal Abuser Prosecution Program by appropriating $30 million over fiscal years 1994 and 1995.[10] Funding in each year totaling $15 million comprises $3.5 million to the Department of Justice[11] for implementation of the Spousal Abuser Prosecution Program and $11.5 million to the State Department of Health Services for administration of the comprehensive shelter-based program by the Maternal and Child Health Branch of the Department.[12]

## INTERPRETIVE COMMENT

California has long recognized the need to address the dangers posed by domestic violence and has attempted to facilitate prosecution of offenders with programs such as the Spousal Abuser Prosecution Program.[13] Chapter 140 was enacted to address a chronic lack of funding that had rendered ineffective the existing Spousal Abuser Prosecution Program.[14]

Authors of the bill and members of the press have cited publicity from a recent murder case involving O.J. Simpson[15] as the impetus that finally spurred the

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8. CAL. HEALTH & SAFETY CODE § 300.5(c) (enacted by Chapter 140); *see id.* § 300.5(c)(1)-(3) (enacted by Chapter 140) (establishing the advisory council and defining its membership, which is composed of 13 voting members appointed by the Governor, the Speaker of the Assembly, and the Senate Committee on Rules); *see also id.* § 300.5(c)(4) (enacted by Chapter 140) (providing for the appointment of two nonvoting members who must be members of the State Legislature and are to be appointed by the Speaker of the Assembly and the Senate Committee on Rules); *id.* (providing that the membership of the advisory council must additionally include domestic violence advocates, service providers to battered women, representatives of women's organizations, representatives of law enforcement, and representatives of other groups addressing domestic violence and providing that the council must reflect ethnic, racial, cultural, and geographic diversity).

9. *Id.* § 300.5(d) (enacted by Chapter 140).

10. 1994 Cal. Legis. Serv. ch. 140, sec. 3, at 446 (enacting Chapter 140).

11. *See* CAL. GOV'T CODE § 15000 (West 1992) (establishing the Department of Justice under the direction of the State Attorney General).

12. 1994 Cal. Legis. Serv. ch. 140, sec. 3, at 446 (enacting Chapter 140).

13. CAL. PENAL CODE § 273.8 (West 1988); *see id.* (stating that spousal abuse presents a clear and present danger to the people of the state and establishing a program that would utilize any available federal funds as well as local matching funds for prosecution of abusers).

14. Memorandum from Assemblymember Barbara Friedman, Assembly, California State Legislature (July 5, 1994) [hereinafter Memorandum] (copy on file with the *Pacific Law Journal*); *see id.* (stating that the Legislature had previously intended to combat domestic violence, but had been unable to fund existing programs); *see also* Ken Chavez, *Wilson Approves $30 Million for Battling Domestic Violence*, SACRAMENTO BEE, July 12, 1994, at A3 (reporting that prior to enactment of Chapter 140, the State had allocated only $1.44 million per year for battered women's shelters and nothing for existing domestic violence prosecution units created by local governments).

15. *See* Gale Holland, *Hearing for O.J. to Provide Only Glimpses of Case*, SAN DIEGO UNION-TRIB., June 30, 1994, at A1 (describing football hero and movie celebrity O.J. Simpson's indictment on double-murder charges in the stabbing deaths of his wife, Nicole Brown Simpson, and her friend Ronald Lyle Goldman).

Legislature to action where it was previously unwilling to further fund existing programs.[16]

Chapter 140 addresses both the abuser and the victim by establishing the intent to provide funds for vertical prosecution,[17] whereby specially trained prosecutors or district attorneys pursue cases from their initial filing to their completion, and for shelters and transitional housing.[18]

*Mark W. Owens*

**Crimes; drug offenders on school grounds**

Penal Code § 626.85 (new).
AB 3409 (Umberg); 1994 STAT. Ch. 1020

Under existing law, specified sex offenders[1] who enter any school[2] grounds and remain there or reenter after being asked to leave,[3] are guilty of a misdemeanor.[4]

16. Carl Ingram, *Spousal Abuse is Targeted*, L.A. TIMES, July 6, 1994, at A3; *see id.* (stating that authors of Chapter 140 capitalized on the notoriety of the O.J. Simpson trial to obtain approval of legislation that represents the largest such expenditure of its kind in the state); *see also* Holland, *supra* note 15 (describing the O.J. Simpson trial as possibly the most closely watched criminal proceeding in history).

17. *See* CAL. PENAL CODE § 273.8 (West 1988) (defining the concept of vertical prosecution as the assignment of a specially trained deputy district attorney or prosecution unit to a case from beginning to end).

18. CAL. HEALTH & SAFETY CODE § 300.5 (enacted by Chapter 140); *see* Memorandum, *supra* note 14 (describing Chapter 140 in terms of its effects on shelters and prosecution); Letter from Pete Wilson, Governor, State of California, to Assemblymembers, California State Assembly (July 9, 1994) (copy on file with the *Pacific Law Journal*) (citing the Governor's reasons for signing Chapter 140 as the strengthening of protections for victims of domestic violence as well as the need to provide a safe haven to those in abusive relationships).

1. *See* CAL. PENAL CODE § 626.8(c)(1) (West Supp. 1994) (defining specified sex offender as any person required to register pursuant to California Penal Code § 290, who has been convicted of a violation of California Penal Code §§ 220, 261, 266, 267, 272, 288, 289, or 286(c), (d), (f), or 288a(c), (d), (f), or of an attempt to commit any of these offenses).

2. *See id.* § 626.85(c)(3) (amended by Chapter 1020) (referring to the California Penal Code § 626.8(c)(5) definition of school as any preschool or school having any of grades kindergarten through 12).

3. *See id.* § 626.8(a)(1)-(2) (West Supp. 1994) (designating the person who must ask the offender to leave as the chief administrative official or his or her designated representative, a person employed as a member of the security or police department of a school district, a city police officer, a sheriff or deputy sheriff, a California Highway Patrol officer, or a California State Police officer).

4. *Id.* § 626.8 (West Supp. 1994); *see id.* § 627.7 (West Supp. 1994) (imposing a fine or imprisonment for up to six months for an outsider who fails or refuses to leave the school grounds promptly after the principal, designee, or school security officer has requested the outsider to leave, or to fail to remain off the school grounds for seven days after being requested to leave, if the outsider enters the school grounds without proper registration).

Chapter 1020 provides that any specified drug offender[5] who enters any school building or upon any school grounds or adjacent public ways, and remains or reenters[6] after being asked to leave or has established a continued pattern of unauthorized entry, is guilty of a misdemeanor.[7]

## INTERPRETIVE COMMENT

Chapter 1020 was introduced in response to the expanding drug use in city parks and adjacent school grounds.[8] Chapter 1020 helps schools combat drug

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5. *See id.* § 626.85(c)(1) (enacted by Chapter 1020) (defining specified drug offender as any person who, within the immediately preceding three years, has been convicted of either: (A) Unlawful sale or possession for sale, of any controlled substance, as defined in California Health and Safety Code § 11007; or (B) unlawful use, possession, or being under the influence of any controlled substance, as defined in California Health and Safety Code § 11007, where that conviction was based on conduct which occurred, wholly or partly, in any school building or upon any school ground, street, sidewalk, or public way adjacent thereto); *see also* CAL. HEALTH & SAFETY CODE § 11007 (West 1991) (defining controlled substance, unless otherwise specified, as meaning a drug, substance, or immediate precursor listed in any schedule in California Health and Safety Code §§ 11054, 11055, 11056, 11057, or 11058). *See generally id.* §§ 11054, 11055, 11056, 11057, 11058 (West 1991 & Supp. 1994) (listing controlled substances).

6. *See* CAL. PENAL CODE § 626.85(a)(2) (enacted by Chapter 1020) (setting the time within which a person may not return at seven days).

7. *Id.* § 626.85(a) (enacted by Chapter 1020); *see id.* (stating that this section does not apply to persons who are parents or guardians of a child attending that school and the parents' or guardians' presence is during any school activity, where the person is a student at the school and the student's presence is during any school activity, or where the person has prior written permission for entry from the chief administrative officer of that school); *id.* § 626.85(b) (enacted by Chapter 1020) (providing for increased punishment for previous convictions of this offense); *see also* 21 U.S.C.A. § 841 (West 1981) (listing prohibited acts and the punishment for the acts); *id.* § 856 (West Supp. 1994) (regarding the establishment of controlled substance manufacturing operations); *id.* § 860 (West Supp. 1994) (providing that any person who violates 21 U.S.C. § 841(a)(1) or § 856 by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within 1000 feet of, a public or private elementary, vocational, or secondary school, a public or private college, junior college, or university, a playground, or within 100 feet of a public or private youth center, public swimming pool, or video arcade or video facility, is subject to twice the maximum punishment authorized by 21 U.S.C. § 841(b)); *id.* (increasing the punishment for subsequent convictions to the greater of a term of imprisonment of a minimum of three years and a maximum of life imprisonment or three times the maximum punishment authorized by 21 U.S.C. § 841(b)).

8. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3409, at 2 (July 5, 1994); *see id.* (stating that while many city ordinances cover public parks, drug dealers can often walk from the park onto school grounds and be unaffected by the law); John Kendall, *Task Force Arrests 83 in Drug Sweep near Schools*, L.A. TIMES, Oct. 14, 1988, at Metro 1 (recognizing that most people are shocked to learn of the excessive drug-trafficking in Los Angeles Schools and that schools should be a safe sanctuary for children); *see also Student Faces Charges; Cops Say Drugs Found at School*, TIMES-PICAYUNE, Feb. 23, 1994, at B1 (revealing that a high school student who brought marijuana onto school grounds, if convicted, could face a minimum sentence of 15 years at hard labor without parole and a $15,000 fine under Louisiana's enhanced penalty for drugs on school grounds). *See generally* Jane Kwiatkowski, *Teens Turn to Violence to Settle Arguments, Frustration, Access to Guns Lead to Deadly Resolution of Conflict, Experts Say*, BUFFALO NEWS, Mar. 22, 1994, at City Edition (recognizing that federal laws mandate a mandatory sentence of five years in prison and $250,000 in fines for anyone caught dealing drugs or carrying a gun within 1000 feet of school grounds).

sales and drug use by keeping convicted drug offenders from entering school grounds.[9]

*Kenneth J. Pogue*

## Crimes; equipment used in the manufacture of a controlled substance

Health and Safety Code §§ 11366.7, 11473, 11473.5 (amended); Penal Code § 1463.10 (new).
SB 937 (Killea); 1994 STAT. Ch. 979

Existing law makes it unlawful for a wholesaler[1] or retailer[2] to knowingly[3] sell[4] any equipment that will be used to manufacture or prepare a controlled substance[5] for sale or distribution.[6] Existing law authorizes a sentence of up to one year in a county jail or imprisonment of sixteen months, or two or three years, in the state prison for a violation of controlled substances regulations.[7] Chapter 979 makes

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9. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3409, at 2 (July 5, 1994); *see id.* (recognizing that drug sales are a growing problem in many communities); *cf.* N.J. STAT. ANN. § 2C:35-1.1 (West Supp. 1994) (declaring the Legislature's policy of affording special protection to children from the perils of drug trafficking, to ensure that all schools and areas adjacent to schools are kept free from drug distribution activities, and to provide especially stern punishment for those drug offenders who operate on or near schools and school busses, who distribute to juveniles, or who employ juveniles in a drug distribution scheme).

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1. *See* CAL. BUS. & PROF. CODE § 4038 (West Supp. 1994) (defining wholesaler as every person who acts as a drug wholesale merchant, broker, jobber, or agent, who sells for resale, or negotiates for distribution any drug included in California Business and Professions Code § 4211).

2. *See* CAL. REV. & TAX CODE § 6015 (West Supp. 1994) (defining retailer as every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making sales for storage, use, or other consumption).

3. *See* CAL. PENAL CODE § 7(5) (West 1988) (defining knowingly as merely having knowledge that the facts exist to bring an act within the provisions of the California Penal Code).

4. *See* CAL. BUS. & PROF. CODE §§ 12009, 17022, 19003 (West 1987) (defining sell as including barter, exchange, trade, keep for sale, offer for sale, or expose for sale); *see also id.* § 13401(a) (West Supp. 1994) (defining sell to include attempts to sell, offers for sale, or assisting in a sale, offering for delivery, trading, bartering, or exposing for sale).

5. *See* CAL. HEALTH & SAFETY CODE § 11007 (West 1991) (defining controlled substance as a drug, substance, or immediate precursor which is listed in any schedule in §§ 11054, 11055, 11056, 11057, or 11058 of California Health and Safety Code).

6. *Id.* § 11366.7(b) (West 1991); *see also id.* § 11366.5 (West Supp. 1994) (providing that it is illegal to knowingly provide room for the manufacture or distribution of controlled substances); People v. Glenos, 7 Cal. App. 4th 1201, 10 Cal. Rptr. 2d 363 (1992) (discussing the application of California Health & Safety Code § 11366.5); Review of Selected 1982 California Legislation, *Criminal Procedure; Controlled Substances*, 14 PAC. L.J. 357, 607 (1983) (discussing the increase in penalties for the sale of any chemical, supply, or equipment that the seller knows will be used in the manufacture of a controlled substance).

7. CAL. HEALTH & SAFETY CODE § 11366.7(b) (West 1991); *see also id.* § 11104(b) (West Supp. 1994) (providing that the sale or transfer of any laboratory glassware or apparatus, with the knowledge that it will be used to manufacture a controlled substance, is a misdemeanor).

a violation punishable by either a sentence of up to one year in a county jail, imprisonment in the state prison for sixteen months, two or three years, a fine which does not exceed $25,000, or both the fine and imprisonment.[8]

Existing law requires the court, where conviction of illegal narcotics possession, sale, or manufacture has taken place, to order the destruction of all seized items which accompanied that conviction.[9] Chapter 979 authorizes law enforcement officers to request that the court allow equipment used in the manufacture of drugs to be given to schools or school districts for classroom education, rather than have it destroyed.[10]

Existing law requires a court having possession of controlled substances, instruments, or paraphernalia as a result of a case where there has been no trial, or as a result of a case that has been disposed of by some way other than conviction, to order the destruction of the seized items.[11] Chapter 979 allows law enforcement officers to request that the court relinquish the seized items to schools or school districts for classroom education if the items were not lawfully possessed by the defendant.[12] Chapter 979 also authorizes the use of collected fines to reimburse the local law enforcement agency for the cost of removing and destroying the illegal equipment.[13]

## INTERPRETIVE COMMENT

The main purpose of Chapter 979 is to provide a stiffer penalty for a violation of controlled substance statutes, thus presenting more of a deterrent to criminals, and also to reimburse local agencies for the costs they incur in the enforcement of the law.[14] Chapter 979 also allows the courts to put to good use the equipment

8. *Id.* § 11366.7(b) (amended by Chapter 979).

9. *Id.* § 11473 (amended by Chapter 979); *cf.* WASH. REV. CODE § 69.50.505.2 (1993) (providing that all equipment used in manufacturing controlled substances is subject to seizure or forfeiture).

10. CAL. HEALTH & SAFETY CODE § 11473(b) (amended by Chapter 979).

11. *Id.* § 11473.5(a) (amended by Chapter 979).

12. *Id.* § 11473.5(b) (amended by Chapter 979).

13. CAL. PENAL CODE § 1463.10 (enacted by Chapter 979); *see also id.* §§ 1463.04, 1463.9, 1463.18, 1463.23, 1463.25, 1463.26 (West Supp. 1994) (authorizing the use of monies collected from fines on many diversified activities).

14. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 937, at 2 (Jan. 27, 1994).

seized in controlled substance violations by allowing disposition of the equipment to school science classes.[15]

*Jason Decker*

**Crimes; graffiti—alternatives for collecting clean up costs**

Government Code §§ 38772, 38773.2, 38773.6 (new); § 53069.3 (amended). SB 302 (McCorquodale); STAT. 1994 Ch. 910

Existing law provides for the regulation of nuisances.[1] A city may abate a nuisance at the expense of the persons responsible for creating, committing, or

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15. CAL. HEALTH & SAFETY CODE §§ 11473(b), 11473.5(b) (amended by Chapter 979); *cf.* ARIZ. REV. STAT. ANN. § 13-4315(A) (West Supp. 1994) (authorizing the disposition of property forfeited to the state under the state's controlled substances legislation in the following ways: Sale or lease to any local or state entity; sale of the property with the money paid into the anti-racketeering fund of the seizing county or state; use of the property; lease of the property; or destruction of the property); FLA. STAT. ANN. § 893.12(c) (West 1994) (allowing for the disposition of seized controlled substances to hospitals or laboratories for medical use); MICH. COMP. LAWS § 333.7524(1) (1992) (allowing seized property to be retained by the state for official use, or sold for the payment of expenses); OKLA. STAT. tit. 63, § 2-508 (West Supp. 1994) (allowing for the disposition of property seized according to the controlled substances legislation of the state in the following ways: Sale, transfer to the Oklahoma State Bureau of Narcotics and Dangerous Drug Control for donation to classroom or laboratory use, or lease); TEX. HEALTH & SAFETY CODE ANN. § 481.159 (West 1992) (allowing seized property to be retained for official use, delivered to a government agency for official use, or delivered to a person authorized by the court).

1. CAL. CIV. CODE §§ 3494, 3495 (West 1970); CAL. GOV'T CODE § 38773 (West Supp. 1994); CAL. HEALTH & SAFETY CODE § 17980 (West Supp. 1994); *see* CAL. CIV. CODE § 3479 (West 1970) (defining nuisance); *id.* § 3494 (West 1970) (allowing a public nuisance to be abated by any public body or officer authorized by law); *id.* § 3495 (West 1970) (allowing any person to abate a public nuisance that affects him or her by removing or destroying the nuisance without committing a breach of the peace or doing unnecessary injury); CAL. GOV'T CODE § 38771 (West 1988) (authorizing a city legislative body to declare by ordinance what constitutes a nuisance); *id.* § 38773 (West Supp. 1994) (authorizing the legislative body to provide for summary abatement of any nuisance at the expense of the persons responsible for its creation or maintenance, and allowing the expense of abatement to become a lien against the property on which it is maintained and a personal obligation against the property owner); *id.* §§ 38773.1, 38773.5 (West Supp. 1994) (establishing a procedure for the abatement of nuisances); CAL. HEALTH & SAFETY CODE § 17980 (West Supp. 1994) (allowing an enforcement agency to take any appropriate action or proceeding to prevent, restrain, correct, or abate a nuisance relating to housing); *see also* CAL. CIV. CODE § 3480 (West 1970) (stating that a public nuisance is one that affects an entire community, neighborhood, or a considerable number of persons at the same time, although the extent of the annoyance may differ between persons); CAL. PENAL CODE § 370 (West 1988) (defining public nuisance). *See generally* 18 CAL. JUR. 3D, *Criminal Law* §§ 1693-1696 (1984 & Supp. 1994) (providing an overview of public nuisance law); 47 CAL. JUR. 3D, *Nuisances* §§ 1-90 (1979 & Supp. 1994) (providing an overview of nuisance law); *id.* § 4 (1979 & Supp. 1994) (discussing the authority of the Legislature to declare the uses of property that constitute a nuisance); *id.* §§ 5-23 (1979 & Supp. 1994) (listing examples of what constitutes a nuisance); *id.* § 16 (1979) (noting that an offense to the aesthetic sense is not sufficient to constitute a nuisance); *id.* § 17 (1979) (stating that indecent conduct is subject to nuisance law); *id.* §§ 33-36 (1979 & Supp. 1994) (describing persons liable for nuisances); *id.* §§ 37-72 (1979 & Supp. 1994) (enumerating remedies for nuisances).

maintaining the nuisance.[2] Chapter 910 specifically allows a city or county to provide for the abatement of a nuisance involving the defacement of property by graffiti[3] or any other inscribed material, at the expense of the minor responsible for the nuisance.[4] A city or county may also make the expense of abatement a lien against the minor's property and a personal obligation against the minor.[5] The parent or guardian having custody and control of the minor is jointly and severally liable with the minor for the nuisance.[6]

Chapter 910 also allows a city or county to establish a procedure to collect costs incurred in abating a nuisance involving graffiti.[7] As an alternative to the

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2. CAL. GOV'T CODE § 38773 (West Supp. 1994); *see id.* (allowing the expense of abatement to become a lien against the property on which it is maintained and a personal obligation against the property owner); *see also* CAL. CIV. CODE § 1714.1 (West 1985) (imputing joint and several liability to the parent or legal guardian of a minor for the minor's willful misconduct); CAL. WELF. & INST. CODE § 728 (West 1984) (requiring a minor guilty of vandalism to make restitution to a property owner, including washing, painting, repairing, or replacing the vandalized property); *id.* § 729.6 (West Supp. 1994) (requiring a minor to make restitution to any victims of his or her crime, or to the Restitution Fund, as a condition of probation).

3. *See* CAL. GOV'T CODE § 38772(d)(2) (enacted by Chapter 910) (defining graffiti or other inscribed material as any unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on any real or personal property); CAL. PENAL CODE § 640.5 (West Supp. 1994) (prohibiting graffiti on or in facilities or vehicles of a governmental entity); *id.* § 640.6 (West Supp. 1994) (prescribing penalties for graffiti on any real or personal property); *id.* § 640.7 (West Supp. 1994) (prohibiting vandalism or graffiti on or within 100 feet of a highway).

4. CAL. GOV'T CODE § 38772(a) (enacted by Chapter 910); *see id.* § 38772(d)(1) (enacted by Chapter 910) (defining expense of abatement to include court costs, attorney's fees, the cost of removing the graffiti or other inscribed material, the cost of repairing and replacing the defaced property, and the law enforcement costs incurred by the city in identifying and apprehending the minor); *id.* § 38772(d)(3) (enacted by Chapter 910) (defining minor, for purposes of this statute, as a minor who has confessed to, admitted to, pled guilty or nolo contendere to, or was convicted by final judgment of a violation of California Penal Code §§ 594, 594.3, 640.5, 640.6, or 640.7, or a minor who was declared a ward of the Juvenile Court pursuant to California Welfare and Institutions Code § 602 for committing an act prohibited by California Penal Code §§ 594, 594.3, 640.5, 640.6, or 640.7); *see also* CAL. PENAL CODE § 594 (West Supp. 1994) (defining vandalism as maliciously defacing, damaging, or destroying any real or personal property, and prescribing penalties); *id.* § 594.3 (West 1988) (providing additional penalties for vandalism in a place of worship or religious instruction); CAL. WELF. & INST. CODE § 602 (West 1984) (stating that any person who was under the age of 18 years old when he or she violated a federal or state law, or a city or county ordinance, may be adjudged a ward of the court by a juvenile court).

5. CAL. GOV'T CODE § 38772(a) (enacted by Chapter 910); *see id.* § 38773.2 (enacted by Chapter 910) (allowing a city or county to establish a procedure to collect abatement and related administrative costs incurred in the abatement of a graffiti nuisance); *id.* § 38773.6 (enacted by Chapter 910) (allowing a city or county to make the abatement and administrative costs for removing a graffiti nuisance a special assessment against land owned by the minor or his or her parent or legal guardian).

6. *Id.* § 38772(b) (enacted by Chapter 910); *see id.* § 38772(c) (enacted by Chapter 910) (requiring the names and addresses of the parent or guardian having custody and control of the minor to be reported by the probation officer of the county to the city clerk or other official designated by the legislative body of the city or county where the nuisance is located); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 302, at 3 (July 5, 1994) (defining custody and control as either physical or legal custody).

7. CAL. GOV'T CODE § 38773.2(a) (enacted by Chapter 910); *see id.* (requiring that notice be sent to the minor and the minor's parent or guardian prior to the recording of a lien against the minor's real property); *id.* § 38773.2(b) (enacted by Chapter 910) (specifying different methods of providing notice to the minor and parent or guardian); *id.* § 38773.2(c) (enacted by Chapter 910) (mandating that a graffiti nuisance abatement lien be recorded in the county recorder's office where the real property is located); *id.* § 38773.2(d) (enacted by Chapter 910) (listing information to be contained in a graffiti nuisance abatement lien under this section); *id.* § 38773.2(e) (enacted by Chapter 910) (requiring notice of discharge of the lien to be recorded by the

procedures, the city or county may make the abatement and related administrative costs a special assessment against the minor's real property, or the real property of the minor's parent or legal guardian.[8]

Under prior law, a city or county could provide for the use of city or county funds to remove graffiti from public or privately owned permanent structures on public or privately owned real property within the city or county.[9] This could only be accomplished upon a finding by the city or county that the graffiti was obnoxious.[10] For a publicly owned structure, consent of the public entity having jurisdiction over the structure was also required.[11] For a privately owned structure, the owner's consent was necessary.[12]

Chapter 910 allows a city or county to replace or repair defaced public or private property that cannot be removed cost effectively, using city or county funds.[13] There is no requirement that the graffiti be found obnoxious.[14] The law enforcement agency providing for removal of the graffiti may also preserve any evidence prior to removal, to be used in criminal proceedings involving the person or persons who inscribed the graffiti.[15]

Chapter 910 does not supersede or replace the liability of a parent or guardian for a minor's willful conduct pursuant to California Civil Code section 1714.1.[16]

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governmental agency that imposed the lien in the grantor-grantee index); *id.* § 38773.2(f) (enacted by Chapter 910) (stating that a graffiti nuisance abatement lien may be satisfied through foreclosure in an action brought by the city); *id.* § 38773.2(g) (enacted by Chapter 910) (allowing the county recorder to charge the city a fee to cover the costs of processing and recording the lien and providing notice to the property owner, and allowing the city to recover this cost from the property owner); *id.* § 38773.2(h) (enacted by Chapter 910) (defining abatement and related administrative costs to include court costs, attorney's fees, the cost of removing the graffiti or other inscribed material, the cost of repairing and replacing the defaced property, and the law enforcement costs incurred by the city in identifying and apprehending the minor); *see also id.* § 38773.1(a) (West Supp. 1994) (establishing a procedure for abatement of nuisances).

8. *Id.* § 38773.6 (enacted by Chapter 910).

9. 1990 Cal. Legis. Serv. ch. 308, sec. 1, at 1293 (amending CAL. GOV'T CODE § 53069.3); *see* CAL. GOV'T CODE § 53069.3(d)(3) (amended by Chapter 910) (defining city or county funds to include court costs, attorney's fees, costs of graffiti removal, costs of repair and replacement of defaced property, and the law enforcement costs incurred in identifying and apprehending the person responsible for the graffiti on publicly or privately owned permanent real or personal property within the city or county).

10. 1990 Cal. Legis. Serv. ch. 308, sec. 1, at 1293 (amending CAL. GOV'T CODE § 53069.3); *see* 47 CAL. JUR. 3D *Nuisances* §§ 15-17 (1979 & Supp. 1994) (providing a general overview of nuisances that affect persons, the aesthetic offensiveness of the nuisance, indecency, and obscenity).

11. 1990 Cal. Legis. Serv. ch. 308, sec. 1, at 1293 (amending CAL. GOV'T CODE § 53069.3).

12. *Id.*

13. *Id.* § 53069.3(a)-(b) (amended by Chapter 910).

14. *Compare id.* § 53069.3(c)(1) (amended by Chapter 910) (stating that city or county funds may be used to remove graffiti from publicly or privately owned property only with the consent of the public entity having jurisdiction over the property, or of the owner or possessor of the property) *with* 1990 Cal. Legis. Serv. ch. 308, sec. 1, at 1293 (amending CAL. GOV'T CODE § 53069.3) (providing that before city or county funds may be used to remove graffiti from public or privately owned property, the city or county must find that the graffiti is obnoxious, and must secure the consent of the public entity having jurisdiction over the structure, or of the owner).

15. CAL. GOV'T CODE § 53069.3(c)(2) (amended by Chapter 910).

16. 1994 Cal. Legis. Serv. ch. 910, sec. 5, at 3904; *see* CAL. CIV. CODE § 1714.1 (West 1985) (imputing joint and several liability to the parent or legal guardian of a minor for the minor's willful misconduct).

INTERPRETIVE COMMENT

Chapter 910 was enacted in response to an increase in graffiti and an increase in the cost of graffiti eradication.[17] Most minors who are caught for their graffiti crimes cannot afford to reimburse the state for clean-up costs.[18] Chapter 910 provides alternatives for collecting these costs.[19]

Under the 1993 California Graffiti Omnibus Bill,[20] penalties were increased for specified graffiti and vandalism offenses, and graffiti clean-up was included as a condition of probation for specified crimes.[21] However, certain graffiti

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17. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 302, at 3 (Aug. 22, 1994); *see id.* (stating that the cost for graffiti eradication in Modesto for the 1993-94 fiscal year was $408,000, and the estimated cost for the 1994-95 fiscal year is $416,000); Tony Knight, *Graffiti "Taggers" Snarl Freeways: L.A. Vandals Spray Paint over Signs That Tell Motorists Where to Go*, L.A. DAILY NEWS, Sept. 27, 1993, at B5 (reporting on the dangers of graffiti obstructing freeway signs); Kimberly Moy, *Graffiti Vandals Etch Work on Windows of Businesses*, SACRAMENTO BEE, July 7, 1994, at B1 (reporting that some graffiti offenses involve etching messages on glass windows with drill bits); Kathryn Dore Perkins, *For "Taggers," Vandalism is "All About Fame,"* SACRAMENTO BEE, Mar. 20, 1994, at B1 (noting that some graffiti offenses are committed by tagging crews made up of rebellious young people hungry for attention); Jim Sanders, *Tough Laws Urged to Win War on Graffiti*, SACRAMENTO BEE, Sept. 5, 1993, at A1 (stating that the State Transportation Department spends approximately $5 million annually in graffiti cleanup costs, while Los Angeles and Orange County each spend $4 million per year).

18. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 302, at 3 (Aug. 22, 1994); *see* CAL. WELF. & INST. CODE § 728 (West 1984) (requiring a minor guilty of vandalism to make restitution to a property owner, including washing, painting, repairing, or replacing the vandalized property); *id.* § 729.6 (West Supp. 1994) (requiring a minor to make restitution to any victims of his or her crime, or to the Restitution Fund, as a condition of probation); *see also* Marisa A. Gomez, Note, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REF. 633, 644 (1993) (discussing different types of graffiti and the motivations of its creators); *id.* at 656 (discussing methods used to combat graffiti); *id.* at 696 (suggesting several reforms to address the problem of graffiti, including distinguishing between graffiti art and graffiti vandalism, providing art space for graffiti and commissioning works, and immediate cleanup of graffiti vandalism).

19. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 302, at 3 (Aug. 22, 1994).

20. *See* 1993 Cal. Legis. Serv. ch. 605, sec. 1, at 2624 (referring to 1993 AB 1179 as the 1993 California Graffiti Omnibus Bill); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 302, at 4 (July 5, 1994) (questioning the need for an increase in penalties under SB 302 in light of the 1993 California Omnibus Graffiti Bill); Frederick S. Gutierrez, Review of Selected 1993 California Legislation; *Crimes; Graffiti*, 25 PAC. L.J. 368, 542 (1994) (discussing the California Graffiti Omnibus Bill).

21. CAL. PENAL CODE § 594 (West Supp. 1994); *see id.* (defining vandalism and prescribing penalties); *id.* § 594.1 (West Supp. 1994) (prohibiting the sale of an aerosol paint container to anyone under 18 years of age, and requiring community service as a condition of probation for a violation of this section); *id.* § 640.5 (West Supp. 1994) (prohibiting graffiti on or in the facilities or vehicles of a governmental entity, and setting penalties); *id.* § 640.6 (West Supp. 1994) (prohibiting graffiti on any real or personal property, and setting penalties); *id.* § 640.7 (West Supp. 1994) (prohibiting graffiti on or within 100 feet of a highway, and setting penalties); *id.* § 1203.1(g)(1) (West Supp. 1994) (requiring the court to consider ordering a defendant convicted of a nonviolent or nonserious offense to perform graffiti removal as part of community service as a condition of probation); CAL. VEH. CODE § 13202.6(a)(2) (West Supp. 1994) (including graffiti cleanup within the scope of community service for persons whose driving privilege has been suspended as the result of specified offenses involving vandalism).

abatement costs could not be collected from the graffiti offender.[22] The enactment of Chapter 910 provides mechanisms to collect these costs.[23]

*Maria V. Daquipa*

**Crimes; graffiti—community service by parents or guardians of convicted minor**

Penal Code § 594.8 (new); Welfare and Institutions Code § 656 (amended). AB 2595 (Connolly); 1994 STAT. Ch. 575

Under existing law, the parent or legal guardian, of a minor who is convicted of possessing a destructive implement with the intent to commit graffiti[1] or convicted of willfully affixing graffiti[2] must pay any fines imposed upon the

22. CAL. PENAL CODE § 640.5(d)(1) (West Supp. 1994) (providing that the court may not order the graffiti offender to pay for costs related to the cleanup of graffiti, other than the actual cleanup, repair or replacement of the damaged property); *id.* § 640.6(d) (West Supp. 1994) (providing that the court may not order the graffiti offender to pay for any costs related to the cleanup of graffiti, other than the actual cleanup, repair or replacement of the damaged property); *see id.* § 640.5(a) (West Supp. 1994) (authorizing a fine of up to $500 for any person who affixes graffiti on government vehicles that incurs cleanup costs of less than $250); *id.* § 640.6(a) (West Supp. 1994) (authorizing a fine of up to $500 for any person who affixes graffiti on any real or personal property that incurs cleanup costs of less than $250).

23. CAL. GOV'T CODE § 38772(d)(1) (enacted by Chapter 910); *see id.* (defining expense of abatement to include courts and attorney fees, graffiti removal costs, costs for repair and replacement of property, and law enforcement costs); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 302, at 3 (Aug. 22, 1994) (quoting the author as stating that SB 302 provides collection alternatives).

1. *See* CAL. PENAL CODE § 594.2 (West Supp. 1994) (regulating the use of drill bits, cutters, and certain other tools which are possessed with the intent to commit vandalism). *See generally* Frederick S. Gutierrez, Review of Selected 1993 California Legislation, *Crimes; Graffiti*, 25 PAC. L.J. 368, 542-47 (1994) (discussing California Penal Code § 594.2).

2. *See* CAL. PENAL CODE § 640.5 (West Supp. 1994) (providing punishment for graffiti of a government entity); *id.* § 640.6 (West Supp. 1994) (providing punishment for graffiti generally); *id.* § 640.7 (West Supp. 1994) (providing punishment for violating California Penal Code §§ 594, 640.5, or 640.6 committing graffiti within 100 feet of a highway or its appurtenances); *see also* CAL. GOV'T CODE § 811.2 (West 1980) (defining public entity); CAL. PUB. UTIL. CODE § 99211 (West 1991) (defining public transportation system); People v. Kahanic, 196 Cal. App. 3d 461, 466, 241 Cal. Rptr. 722, 725 (1987) (stating that vandalism is not criminal conduct if the property which is damaged is under the exclusive ownership of the actor and not shared ownership, such as with a spouse).

minor if the minor is unable to pay them.[3] Existing law also provides that the minor offender must perform a certain number of hours of community service.[4]

Chapter 575 states that the minor offender must perform a minimum of twenty-four hours community service.[5] Chapter 575 further provides that a parent or legal guardian will be required to accompany a minor offender for at least one-half of the specified time the minor is required to perform the community service.[6] However, participation will not be required where the court deems the presence of the parent, guardian or foster parent will be inappropriate or potentially detrimental to the child.[7]

## INTERPRETIVE COMMENT

Many communities are growing more frustrated with the high cost of removing graffiti caused by gangs of taggers.[8] As a result of this concern, Chapter 575 shifts responsibility for controlling youths from the state to the parents of the child.[9] The purpose is to force parents to take responsibility for the actions of their

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3. CAL. PENAL CODE §§ 640.5(d)(2), 640.6(e) (West Supp. 1994); *see id.* (stating that if a minor who affixes graffiti on real or personal property is unable to pay any fine, then the parent or legal guardian of the minor is liable for payment of the fine); *id.* §§ 594-602.8 (West 1988 & Supp. 1994) (setting forth the 1993 California Graffiti Omnibus Bill designed to combat vandalism); *see also id.* § 594.8 (enacted by Chapter 575) (providing that the offense must have occurred prior to the child reaching the age of 18); *cf.* General Accident Fire & Life Assurance Corp. v. Azar, 119 S.E.2d 82, 84-85 (Ga. Ct. App. 1961) (defining vandalism and malicious mischief); Board of Educ. v. Hansen, 153 A.2d 393, 396-97 (N.J. Sup. Ct. 1959) (finding that a statute holding the parents of juvenile offenders responsible for the juvenile offenders' actions was constitutional and fair).

4. CAL. PENAL CODE §§ 594.2(b), 640.5(b), 640.6(a), 640.7(b) (West Supp. 1994); *see id.* (imposing minimum community service penalties).

5. *Id.* § 594.8 (enacted by Chapter 575).

6. *Id.* (enacted by Chapter 575); *cf.* Board of Educ. v. Caffiero, 431 A.2d 799, 801 (N.J. Sup. Ct. 1981) (upholding the constitutionality of a New Jersey statute which holds the parents of public school students vicariously liable for the offenses of their children), *appeal dismissed*, 454 U.S. 1025 (1951). *See generally* Capt. L. Sue Hayn, *The Civil Liability of Soldiers for the Acts of Their Minor Children*, 115 MIL. L. REV. 179, 180 (1987) (explaining generally the civil liability of a parent for a child's misconduct).

7. CAL. PENAL CODE § 594.8 (enacted by Chapter 575).

8. Stephanie Salter, *Graffiti Poison a City's Self-Esteem*, S.F. EXAMINER, Oct. 12, 1993, at A19; *see* John R. Lewis, *Commentary On Graffiti; Tough Legislation Aims to Wipe Out the 'Tagging' Epidemic; Passage is Urged for SB 583, Which Would Stiffen Conventional Penalties for Convicted Offenders*, L.A. TIMES, March 21, 1993, at B15 (defining a 'tagger' as a young person engaged in the vandalism of property, who is not necessarily a gang member); *see also* Chet Barfield, *La Mesa Graffiti Law Makes Parents Clean up, Cough up*, SAN DIEGO UNION-TRIB., Dec. 17, 1993, at B1 (discussing the imposition of fines of up to $10,000 to help pay for graffiti cleanup); Debra Cano, *Orange County Focus/Northwest: Buena Park; Anti-Graffiti Law Called 'Intrusion'*, L.A. TIMES, Feb. 10, 1994, at B3 (stating that the city of Buena Park spends about $82,000 a year on graffiti removal); Lewis, *supra* at B15 (providing that Orange County spent more than $1.8 Million in 1990-91 and $2.6 million in 1991-92, and that this cost is expected to climb); Debra L. Vial, *A New Way to Erase Graffiti Councilman Would Go After Vandals Parents*, THE RECORD, Mar. 9, 1994, at CO1 (reporting concern that small businesses will not be able to remain open because of the high cost of removing graffiti); *cf. On the Issue: Informed Opinions on Today's Topics; Are the Parents Responsible for Kids' Graffiti?*, L.A. TIMES, June 11, 1993, at B2 [hereinafter *Informed Opinions*] (stating that a tagger is rarely caught and that parents have little control because tagging is territorial and anti-authoritarian).

9. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2595, at 2 (June 28, 1994); *see* Cano, *supra* note 8 (maintaining that the break down of parents controlling their children is a major cause of graffiti).

children.[10] By involving the parents, they will be encouraged to educate their children on the evils of graffiti.[11] Commentators have emphasized that the lack of supervision of youths is linked to crimes like vandalism because most delinquents have delinquent friends and there is a greater likelihood of committing delinquent acts in unsupervised groups.[12]

Holding parents liable may not be an effective deterrent because it is hard to expect parents to be with their child all of the time.[13] Furthermore, the families that would suffer most are minorities, single parent, and two-job-income families that are barely able to make ends meet.[14] These commentators maintain that it is time to stop penalizing parents who are doing the best that they can to take care of their children.[15]

Chapter 575 specifies a minimum number of community service hours because of the desire to create uniformity between those who possess certain instrumentalities with the intent to commit graffiti under California Penal Code section 594.2, and those who actually commit the act.[16] The Legislature believes that community service helps rehabilitate the offender.[17]

*Decio C. Rangel, Jr.*

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10. Cano, *supra* note 8; *see Informed Opinions, supra* note 8 (stating that if parents were forced to help with community service, they might care what their children do and may supervise them more carefully); *see also* Lewis, *supra* note 8 (emphasizing that it is the parents of taggers who have the most impact on the youths because most graffiti is done at night when most adolescents should be at home).

11. Cano, *supra* note 8.

12. Robert J. Sampson, *Personal Violence by Strangers: An Extension and Test of the Opportunity Model of Predatory Victimization*, 78 J. CRIM. L. & CRIMINOLOGY 327, 333 (1987); *see id.* (stating that households with two parents provide increased supervision which is important because most delinquents run around in groups and remain unsupervised).

13. Christopher Kilbourne, *Legal Experts Assail Parental Liability Bill Doubt it Will Survive Constitutional Scrutiny*, THE RECORD, Aug. 31, 1994, at A03 (discussing a bill to hold parents criminally and financially liable for the crimes of their children).

14. *Mayor, Council are Putting too Heavy Burden on Parents*, ARIZ. REPUBLIC, Feb. 13, 1994, at D4; *see id.* (providing that courts are admitting failure to control youths and are switching the responsibility back onto the shoulders of parents).

15. *Id.*; *see id.* (stating that it is time that the courts start spending money on real crime).

16. SENATE JUDICIARY COMMITTEE, *supra* note 9, at 3; *see* CAL. PENAL CODE § 594.2 (West Supp. 1994) (regulating the use of drill bits, cutters, and certain other tools which are possessed with the intent to commit vandalism). *See generally* Gutierrez, *supra* note 1 (discussing California Penal Code § 594.2).

17. Mimi Ko, *Orange County Focus: La Habra; Ordinance Targets Graffiti Vandals*, L.A. TIMES, May 8, 1993, at B3; *see* W. YOUNG, COMMUNITY SERVICE ORDERS: THE DEVELOPMENT AND USE OF NEW PENAL MEASURE 33 (1979) (listing that the three philosophies underlying the introduction of community services for minor offenses include punishment, reparation, and reintegration).

## Crimes; graffiti—increase in maximum damages imputed to parents

Civil Code § 1714.1 (amended); Government Code § 53069.3 (amended); Penal Code §§ 594, 594.4, 594.6, 594.7, 640.5, 640.6 (amended); Vehicle Code § 13202.6 (amended); Welfare and Institutions Code § 728 (repealed); 742.10, 742.12, 742.16, 742.18, 742.20, 742.22 (new).
SB 1779 (Bergenson); 1994 STAT. Ch. 909

Existing law prohibits vandalism.[1] Existing law also makes it illegal to sell to a person under the age of eighteen, or for a person under the age of eighteen to possess,[2] a can of aerosol paint, capable of being used for graffiti.[3] Under existing law, acts of vandalism are punishable by fines and imprisonment.[4] Chapter 909 increases the penalty for acts of vandalism.[5]

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1. CAL. PENAL CODE § 594(a)(1)-(3) (amended by Chapter 909); *see id.* (criminalizing vandalism and describing vandalism as either the defacement with graffiti or other inscribed material, or damages or destruction of any real or personal property); *see also id.* § 7(11) (West 1988) (defining real property); *id.* § 7(12) (West 1988) (defining personal property); People v. Brumley, 242 Cal. App. 2d 124, 128, 51 Cal. Rptr. 131, 134 (1966) (explaining that to deface does not necessarily mean to obliterate, and to alter does not require change beyond recognition); *cf.* State v. Kasnett, 283 N.E.2d 636, 638 (Ohio Ct. App. 1972), *rev'd,* 297 N.E. 2d 537 (Ohio 1973) (defining deface as meaning to mar, injure, or spoil). *See generally* D.E. Evins, Annotation, *What Constitutes "Vandalism" or "Malicious Mischief" Within Coverage of Property Insurance Policy,* 23 A.L.R. 3D 1259 (1969 & Supp. 1993) (discussing cases from other jurisdictions that establish definitions of vandalism and malicious mischief).

2. *See* People v. Gory, 28 Cal. 2d 450, 454-55, 170 P.2d 433, 436 (1946) (holding that the term possession means an immediate and exclusive possession under the dominion and control of the individual, and a defendant having such control must have knowledge of the presence of the forbidden item); *see also* CAL. EVID. CODE § 637 (West 1966) (specifying that the things which a person possesses are presumed to be owned by him); *cf.* United States v. Ocampo, 937 F.2d 485, 489 (9th Cir. 1991) (stating that possession means dominion and control and may be proven circumstantially by proof of exclusive dominion or of some special relationship, and that it is not enough to show mere proximity or a defendant's presence on the property which it is found).

3. CAL. PENAL CODE § 594.1 (a)(1) (West Supp. 1994); *see id.* (criminalizing the sale or transfer to any minor of any aerosol container of paint, unless by a parent or legal guardian); *id.* § 594.1 (a)(3)-(4) (West Supp. 1994) (listing the exceptions to the sale or transfer of aerosol containers of paint); *see also* Sherwin Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 906, 844 P.2d 534, 542, 16 Cal. Rptr. 2d 215, 223 (1993) (holding that a local ordinance, which prohibited retailers from displaying aerosol paint containers where they would be accessible by the public, was not preempted by California Penal Code § 594.1 because the express preemption provision in the statute when originally enacted was not carried over into its later amendment).

4. CAL. PENAL CODE § 594(b)(1)-(4) (amended by Chapter 909); *see id.* § 594(b)(1) (amended by Chapter 909) (punishing vandalism that results in over $50,000 worth of damage with imprisonment in state prison or county jail not to exceed one year, by a fine of $50,000, or by both); *id.* § 594(b)(2) (amended by Chapter 909) (punishing vandalism that results in between $5000 and $50,000 worth of damage with imprisonment in state prison or county jail not to exceed one year, by a fine of $10,000, or by both); *id.* § 594(b)(3) (amended by Chapter 909) (punishing vandalism that results in between $400 and $5000 worth of damage with imprisonment in county jail not to exceed one year, by a fine of $5000, or by both); *id.* § 594(b)(4) (amended by Chapter 909) (punishing vandalism that results in damage of less than $400 with imprisonment in county jail not to exceed six months, by a fine of $1000, or by both).

5. CAL. PENAL CODE § 594(b)(3) (amended by Chapter 909); *see id.* (stating that if the amount of damage, defacement, or destruction is between $400 and $5000 the punishment will be a maximum of one year imprisonment in county jail, a fine of $5000, or both).

Under existing law, the parents of a minor can be held civilly liable for any damage performed by their minor to the property of another.[6] Chapter 909 increases the maximum amount of damages that may be imputed to the parents or guardian from $10,000 to $25,000.[7] Further, Chapter 909 requires the Judicial Council to adjust the amount every two years to reflect changes in the cost of living.[8]

Chapter 909 also provides that it will not impose liability upon an insurer for loss caused by the willful act of the insured.[9] Chapter 909 further limits insurers' liability by providing that an insurer is not liable for more than $10,000 for conduct that is imputed to a parent or guardian.[10] Chapter 909 incorporates the changes in vandalism offenses into existing law that allows a minor to have his or her driver's license suspended for vandalism related offenses.[11]

Chapter 909 further expands the ability of cities, counties, and school districts to recover the cost to repair, replace, or remove graffiti from property by requiring the minor to wash, paint, repair, or replace the damaged or defaced property or to pay restitution to the owner of the property that has been defaced.[12] Chapter 909 also allows counties or cities with specified ordinances to allow a probation officer to pursue reimbursement for costs associated with graffiti cleaned up by someone other than the perpetrator.[13] Additionally, Chapter 909 permits the county to recoup the costs of apprehension from the minor.[14] Chapter 909 also allows the court, in its discretion, to require the parents of the convicted minor to pay these costs if the minor or the minor's estate is unable to pay the

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6. CAL. CIV. CODE § 1714.1(a) (amended by Chapter 909); *see id.* (imputing civil responsibility to parents, making them jointly and severally liable for any willful misconduct by their minor child that results in the injury or death of another or in an injury to the property of another).

7. *Id.*

8. *Id.* § 1714.1(c) (amended by Chapter 909); *see id.* (declaring that on or before January 1, 1997, and on or before January 1 of every odd-numbered year thereafter, the Judicial Council must adjust and publish the new damage amounts).

9. *Id.* § 1714.1(e) (amended by Chapter 909).

10. *Id.*

11. CAL. VEH. CODE § 13202.6(a)-(d) (amended by Chapter 909); *see id.* (describing the procedure and situations in which a minor's license may be suspended). *See generally* Frederick S. Gutierrez, Review of Selected 1993 California Legislation, *Crimes; Graffiti*, 25 PAC. L.J. 368, 642 (1994) (discussing California Vehicle Code §13202.6); Jennifer Kerr, *Graffiti Vandals to Lose Rights to Drive--New Law Allows Courts to Suspend Licenses to Teens Caught Defacing Public Places*, S.F. CHRON., Dec. 6, 1990, at C21 (reporting that San Francisco spent over $2 million and the City of Los Angeles spent over $9 million cleaning up graffiti, and further reporting that an 18-year-old may have caused over $500,000 damage alone by painting the word "Chaka" on over 10,000 signs and buildings in southern California).

12. CAL. WELF. & INST. CODE § 742.14 (enacted by Chapter 909); *see id.* § 742.14 (a)-(b) (enacted by Chapter 909) (listing the procedure cities or counties can use to enact ordinances to allow probation officers to collect costs or to implement restitution for graffiti); *id.* § 742.14(d) (enacted by Chapter 909) (allowing schools and local public agencies to institute similar measures to recoup costs caused by graffiti); *id.* 742.16(a) (enacted by Chapter 909) (describing methods that the probation officer may use to seek restitution if the graffiti has yet to be cleaned up, removed, or the structure repaired).

13. *Id.* § 794.14(a)-(b) (enacted by Chapter 909); *see id.* (listing procedures to be used if the graffiti has already been removed or the property had been repaired or replaced).

14. *Id.* § 742.16(c) (enacted by Chapter 909).

costs in full.[15] Chapter 909 limits parental vicarious liability for restitution and costs to $20,000.[16]

INTERPRETIVE COMMENT

Chapter 909 enacts legislation intended to assist public and private property owners in recovering costs from graffiti perpetrators.[17] Chapter 909 does this by providing local governments with the power to recoup costs from minors, yet it still provides the courts the discretion to use rehabilitative methods.[18] The statewide problem of graffiti abatement has proven to be very costly.[19] Contrary to some popular opinion, the graffiti problem is not limited to southern California.[20] One city claims to have new graffiti reported every fifteen minutes.[21]

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15. *Id.* § 742.16(d) (enacted by Chapter 909); *see id.* (requiring the court to hold a hearing to determine parental liability, and except when the court finds unusual circumstances that suggest it would be contrary to the interests of justice, the court must order the parents to pay liability to the extent that they are capable of paying); *see also id.* § 742.16(f) (enacted by Chapter 909) (barring the parent's right to counsel for amounts of $5000 or less); *id.* § 742.16(g) (enacted by Chapter 909) (allowing counsel for cases in which liability exceeds $5000 or more).

16. *Id.* § 742.18(b) (enacted by Chapter 909).

17. *Id.* § 742.10 (a) (enacted by Chapter 909).

18. *Id.* § 742.10(b) (enacted by Chapter 909); *see id.* (specifying the intent of the Legislature in maintaining fiscal integrity); *id.* § 742.10(f) (enacted by Chapter 909) (stating the Legislative intent to retain the discretion of the juvenile courts needed to accomplish its rehabilitating goals); *cf.* John Lewis, *Commentary on Graffiti*, L.A. TIMES, Mar. 21, 1993, at B15 (arguing that sidewalk sociologists who label graffitiers as misguided youths expressing their creativity are wrong and that these youths are "property destroying juvenile delinquents" that must be stopped). *But see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1779, at 5 (July 5, 1994) (relaying the opposition of Susan Hoffman, a poet, who argues that Chapter 909 seriously impinges upon the First Amendment rights of everyone, and that troubled and frustrated youths are only looking for a creative outlet).

19. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1779, at 2 (Aug. 31, 1994); *see id.* (stating that the Orange County Board of Supervisors estimated that they spent more than $4 million annually in clean-up and replacement of graffiti damaged property and individual municipalities spend as much as $1.2 million per year on clean up activities); *id.* (discounting the numbers by adding that it does not reflect costs incurred by public utilities, private business, or homeowners); Jake Doherty, *Urban Scrawl; They Got it Covered; Armed With Paint, Rollers; and City Assistance, Residents Launch Counteroffensives in the War on Graffiti Taggers*, L.A. TIMES, Apr. 4, 1993, at City Times 15 (stating that Los Angeles County spent $66 million in public and private funds to eradicate graffiti). *But see* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1779, at 5 (July 5, 1994) (relaying the opposition of California Attorneys for Criminal Justice who argue that imposing parental liability may send the wrong message to culpable juveniles and that this may enhance intra-family conflicts).

20. Lewis, *supra* note 18 at B15; *see id.* (analogizing the rise in graffiti to a deadly plague that is spreading with explosive speed, scaring communities).

21. *Id.*

Chapter 909 would assist municipalities in recouping the costs of their graffiti abatement efforts.[22]

*Chris J. Ore*

**Crimes; guns—Gun-Free School Zone Act of 1995**

Penal Code § 626.9 (amended).
AB 645 (Allen); 1994 STAT. Ch. 1015

Under prior law, any person, with the exception of certain authorized individuals,[1] who brought a loaded[2] firearm[3] on school grounds,[4] without written permission from a school authority,[5] would be sentenced to the state prison for a term of two, three, or four years.[6] Prior law also required a sentence of one, two, or three years to be imposed on any person convicted of bringing an unloaded firearm on school grounds.[7] Chapter 1015 creates the Gun-Free School Zone Act of 1995.[8] The Act requires a sentence of two, three, or five years to be imposed

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22. *See* Douglas Alger, *New Penalties Proposed in Graffiti Fight*, L.A. TIMES, Oct. 12, 1993, at B14 (discussing local penalties and measures to reduce graffiti); Doherty, *supra* note 19, at City Times 15 (discussing local methods of dealing with graffiti).

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1. *See* 1991 Cal. Legis. Serv. ch. 4, sec. 4, at 3 (amending CAL. PENAL CODE § 626.9) (allowing a California peace officer, a full-time paid peace officer of another state or the federal government who is carrying out official duties, any person summoned by these officers to assist in an arrest or preserving the peace, members of the military of the State or the United States who are performing their duties, persons with a valid license to carry a firearm, and armored vehicle guards in the performance of their duties, to possess a firearm on school grounds).

2. *See id.* (defining a firearm as loaded when there is an unexpended cartridge or shell, consisting of a case which holds a charge of powder and a bullet or shot, in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm).

3. *See* CAL. PENAL CODE § 12001 (West 1992) (defining firearm as a device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion).

4. *See* 1991 Cal. Legis. Serv. ch. 4, sec. 4, at 3 (amending CAL. PENAL CODE § 626.9) (specifying the schools covered by the statute, including public schools, the University of California, the California State University, the California Community Colleges, any private school providing instruction in kindergarten or grades one through twelve, or a private university or college).

5. *See id.* (allowing possession of a firearm on school grounds with written permission of the school district superintendent, his or her designee, or equivalent school authority).

6. *Id.*; *see* People v. Singer, 56 Cal. App. 3d Supp. 1, 6, 128 Cal. Rptr. 920, 923 (1976) (finding that the statute proscribing possession of a firearm on school grounds was not a denial of equal protection of the laws and that the statute clearly gave notice that the possession of unloaded firearms on school grounds was proscribed).

7. 1991 Cal. Legis. Serv. ch. 4, sec. 4, at 3 (amending CAL. PENAL CODE § 626.9).

8. CAL. PENAL CODE § 626.9(a) (enacted by Chapter 1015); *see id.* (stating that this section is to be known as the Gun-Free School Zone Act of 1995).

on any person, with the exception of certain authorized individuals,[9] convicted of possessing a firearm in a school zone,[10] without written authorization,[11] where the person knows or reasonably should know, that the area is a school zone.[12] The sentence for conviction of possession of a loaded firearm on a college or university campus[13] remains a term of two, three, or four years and for possession of an unloaded firearm on these campuses remains a term of one, two, or three years.[14]

Several exceptions are provided to allow the possession of a firearm in a school zone, including possession: (1) On private property not part of the school grounds; (2) where the firearm is unloaded and is capable of being concealed on the person and is in a locked container or in the locked trunk of a motor vehicle; (3) where the firearm is not one capable of being concealed on the person, but is otherwise being transported according to state law in the trunk of a motor vehicle; and (4) where there is an existing shooting range on the school grounds.[15]

Existing law provides certain penalties for willfully and maliciously discharging a firearm at an occupied dwelling, motor vehicle, or other occupied place,[16] discharging a firearm in a grossly negligent manner which could cause injury or death,[17] and discharging a firearm at an unoccupied motor vehicle, uninhabited building, or dwelling house without the owner's consent.[18] Under

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9. *See id.* § 626.9(l) (amended by Chapter 1015) (allowing a California peace officer, a full-time paid peace office of another state or the federal government who is carrying out official duties, any person summoned by these officers to assist in an arrest or preserving the peace, members of the military of the state or the United States who are performing their duties, persons with a valid license to carry a firearm pursuant to the California Penal Code, and armored vehicle guards in the performance of their duties, to possess a firearm on school grounds); *id.* § 626.9(m) (amended by Chapter 1015) (authorizing retired peace officers and security guards to carry a loaded firearm pursuant to California Penal Code § 12031).

10. *See id.* § 626.9(e)(1) (amended by Chapter 1015) (defining a school zone as an area in, or on the grounds of, a public or private school providing instruction in kindergarten or grades one through twelve, inclusive, and within a distance of 1000 feet from the grounds of the public or private school).

11. *See id.* § 626.9(b) (amended by Chapter 1015) (allowing possession of a firearm on school grounds with written permission of the school district superintendent, his or her designee, or equivalent school authority).

12. *Id.* § 626.9 (amended by Chapter 1015). For similar state statutes, see FLA. STAT. ANN. § 810.095 (West 1994); KAN. STAT. ANN. § 21-4204 (Supp. 1993) LA. REV. STAT. ANN. § 14:95.2 (West 1986 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 269, § 10(j) (West 1990); N.J. STAT. ANN. § 2C:39-5(e) (West 1982 & Supp. 1994); N.Y. PENAL LAW § 265.01 (McKinney 1989); R.I. GEN. LAWS § 11-47-60 (Supp. 1993); TENN. CODE ANN. § 39-17-1309 (1991); VA. CODE ANN. § 18.2-280 (Michie Supp. 1994); WIS. STAT. ANN. § 948.605 (West 1982 & Supp. 1993).

13. *See* CAL. PENAL CODE § 626.9(h), (i) (amended by Chapter 1015) (defining a university or college campus as including the University of California, the California State University, the California Community Colleges, or any private university or college).

14. *Id.*

15. *Id.* § 626.9(c), (n) (amended by Chapter 1015); *see id.* §§ 12025-12027 (West Supp. 1994) (describing procedures for lawfully transporting firearms in a motor vehicle).

16. *See id* § 246 (West 1988) (providing a penalty of three, five, or seven years in the state prison or up to one year in the county jail).

17. *See id.* § 246.3 (West Supp. 1994) (providing penalty of 16 months or two or three years in the state prison or up to one year in the county jail).

18. *Id.* § 247 (West 1994); *see id.* (providing a penalty of 16 months or two or three years in the state prison or up to one year in the county jail).

Chapter 1015, a person convicted of discharging or attempting to discharge a firearm in a school zone with reckless disregard for the safety of others, will be sentenced to the state prison for a term of three, five, or seven years.[19]

## INTERPRETIVE COMMENT

There is widespread concern that children cannot be educated properly and become productive citizens when they must constantly fear for their lives and that the proliferation of handguns has led to this situation.[20] Chapter 1015 was designed to increase safety in and around school grounds, specifically by providing stiffer penalties for guns on campuses.[21] However, there is concern that Chapter 1015 criminalizes conduct of citizens whom the statute did not intend to reach.[22] In addition, many people feel that placing restrictions on the possession of handguns is not the solution to crime problems, and that more emphasis should be placed on incarcerating those who use handguns in an illegal manner.[23]

*Johnnie B. Beer*

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19. *Id.* § 626.9(d), (g) (amended by Chapter 1015).

20. Marian Wright Edelman, *Leave No Child Behind*, 15 CARDOZO L. REV. 1591, 1599 (1994); *see id.* (discussing the problems facing America's youth and discussing an Illinois high school survey which revealed that one in twenty students had brought a gun to school); Jerry Roberts, *How to Survive Third Grade*, S.F. CHRON., Apr. 23, 1994, at A22 (quoting the author of Chapter 1015 as saying that "children are losing their education over safety concerns"); Thomas Toch et al., *Violence in Schools* U.S. NEWS & WORLD REP., Nov. 8, 1993, at 30 (stating that for many students, attending school represents an act of courage); *see also* Terry L. Butler, *School Peace is Community Issue: The Schools Mirror Their Society*, CLEV. PLAIN-DEALER, Dec. 2, 1993, at 7B (reporting the results of a Harris poll which found that one in twenty-five students have taken a handgun to school and also noting that during the 1992-1993 school year, thirty-one handgun-related deaths occurred on the nation's school grounds).

21. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 645, at 2 (Jan. 11, 1994); *see id.* (stating that crime is at the top of the public's concerns and that the public demands tougher penalties to combat violent crime); *State Judges' Federation Urges Legislature to Pass Criminal Justice Measures*, N.Y. L.J., June 1, 1994, at 1 (noting the call of the Federation of New York State Judges for penalties that are even stricter than those provided for in Chapter 1015).

22. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 645, at 5 (Jan. 11, 1994); *see id.* (stating that there are no provisions to protect gun dealers, manufacturers, wholesalers, common carriers or to use a firearm in a school zone in lawful self-defense); Mike McCloy, *Tempers Flare Over Bills Aimed at Youths, Guns*, PHOENIX GAZETTE, Jan. 25, 1994, at B1 (expressing concerns that citizens legally carrying handguns will be caught up in the criminal justice system for making the unfortunate mistake of traveling near a school zone, under a similar Arizona statute).

23. Dick Christian, *Group Opposes Any Legislation to Ban Guns*, BUFFALO NEWS, Mar. 25, 1994, at 4; *see id.* (noting the position of pro-gun advocates that passage of tougher sentencing provisions, such as "three-strikes" laws, would be more effective at reducing crime than handgun control and asserting that gun control laws seldom produce results).

## Crimes; habitual sexual offenders—elimination of sentencing credits

Penal Code § 667.71 (amended).
AB 2261 (Peace); 1994 STAT. Ch. 446

Under prior law, a habitual sexual offender[1] sentenced for the minimum term of twenty-five years was eligible to have his or her sentence reduced for good behavior to not less than twenty years.[2] Chapter 446 removes the possibility for a reduction in sentence for good behavior if the sentence is under twenty-five years and provides that the offender will not be eligible for parole until he or she has been incarcerated for the minimum twenty-five years.[3]

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1. *See* CAL. PENAL CODE § 667.71(a) (amended by Chapter 446) (defining habitual sexual offender as someone who has previously served at least one prison term for rape, oral copulation, or sodomy by force); *see also id.* § 667.6(a) (West Supp. 1994) (granting a punishment enhancement for repeat offenders); *id.* § 667.8 (West 1988) (granting a punishment enhancement for certain conduct including kidnapping); *cf.* COLO. REV. STAT. § 18-3-412 (1986) (defining habitual sexual offender); OHIO REV. CODE ANN. § 2950.01(a) (Anderson 1993) (defining habitual sexual offender to include any person who is convicted two or more times in separate criminal actions of specified sex offenses); UTAH CODE ANN. § 76-3-407 (1990) (establishing a sentence enhancement for repeat and habitual sexual offenders); Funk v. State, 427 N.E.2d 1081, 1086 (Ind. 1981) (establishing the constitutionality of the Indiana habitual offender statute); Rolack v. Commonwealth, 514 S.W.2d 47, 49 (Ky. 1974) (maintaining that imposing life sentences under Kentucky's habitual criminal statute is neither cruel nor unusual punishment).

2. 1993 Cal. Legis Serv. ch. 590, sec. 2, at 2558-59 (enacting CAL. PENAL CODE § 667.71); *see* Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 273-74 (1940) (upholding a sentencing statute that allows commitment procedures to be brought against habitual sexual offenders and finding that the law does not deny equal protection of the laws); People v. Preciado, 116 Cal. App. 3d 409, 412, 172 Cal. Rptr. 107, 108-09 (1981) (holding that the mandatory imposition of consecutive sentences for violent rapes does not constitute cruel and unusual punishment and that the severity of the sentence is directly proportional to the number of offenses and the violence of the crimes); *see also* People v. Warner, 20 Cal. 3d 678, 689, 574 P.2d 1237, 1243, 143 Cal. Rptr. 885, 891 (1978) (stating that the protection of society is the paramount concern in sentencing); *cf.* UTAH CODE ANN. § 76-3-407 (1990) (providing additional prison terms for repeat and habitual sexual offenders); Johnson v. State, 537 N.E.2d 1191, 1193 (Ind. 1989) (stating that aggravating circumstances do not limit the evidence which the judge may consider in determining the proper sentence to proscribe; however, they may serve as guidelines); People v. Carmickle, 360 N.E.2d 794, 797 (Ill. 1977) (explaining that the Illinois Constitution requires penalties to be decided according to the seriousness of the offense and that all the circumstances should be examined by the judge with the objective of returning the offender to society as a responsible citizen). *See generally* People v. Valencia, 207 Cal. App. 3d 1042, 1045, 255 Cal. Rptr. 180, 182 (1989) (providing that the court should not be given the power of discretion to order concurrent enhancement terms); People v. Wallace, 169 Cal. App. 3d 406, 411, 215 Cal. Rptr. 203, 206 (1985) (holding that no federal equal protection violation necessarily occurs when a defendant is charged under the harsher statute when two sentencing enhancement statutes overlap); People v. Weaver, 161 Cal. App. 3d 119, 128, 207 Cal. Rptr. 419, 425 (1984) (holding that it is not unconstitutional to enhance a sentence by adding 15 years because of three prior serious felony convictions).

3. CAL. PENAL CODE § 667.71(b) (amended by Chapter 446); *cf.* Graham v. West Virginia, 224 U.S. 616, 631 (1912) (holding that the Eighth Amendment, prohibiting cruel and unusual punishment, is not violated by recidivist statutes authorizing heavier or enhanced sentences for subsequent offenses); People v. Crockett, 222 Cal. App. 3d 258, 265, 271 Cal. Rptr. 500, 504 (1990) (holding that enhancements based upon prior convictions are intended to deter recidivism by increasing penalties for subsequent offenses), *rev. denied*, 1990 Cal. LEXIS 4423 (1990); People v. Karsai, 131 Cal. App. 3d 224, 242, 182 Cal. Rptr. 406, 417 (1982) (providing that violent offenders and the danger from recidivism and multiplicity of offenses are so outrageous that severe punishment will not shock the conscience and offend fundamental notions of human dignity).

Under existing law, a habitual sexual offender is anyone who has been previously found guilty of rape,[4] oral copulation,[5] or sodomy[6] by force and is convicted again for one of those offenses.[7] Chapter 446 adds to the list kidnapping[8] with intent[9] to commit one of those offenses, or rape by instrument.[10]

## INTERPRETIVE COMMENT

The purpose of Chapter 446 is to remove habitual sexual offenders from society.[11] The fear prompting this legislation is that the criminal justice system has failed because of its lack of effectiveness in keeping these offenders behind bars.[12] Specific sentencing provisions would have a large impact on this type of crime, because of the relatively small number of targeted offenders that fit into

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4. *See* CAL. PENAL CODE § 261 (West Supp. 1994) (defining the crime of rape); *id.* § 263 (West 1988) (defining the act of rape as sexual penetration, however slight, followed by the victim's outrage and feeling that he or she was raped); *id.* § 264.1 (West 1988) (providing punishment for rape or penetration of genital or anal openings by foreign object, and acting in concert); *see also Karsai*, 131 Cal. App. 3d at 232, 182 Cal. Rptr. at 411 (explaining that actual vaginal penetration is not required to constitute rape).

5. *See* CAL. PENAL CODE § 288a (West Supp. 1994) (defining oral copulation).

6. *See id.* § 286 (West Supp. 1994) (defining sodomy and providing liability for sodomy).

7. CAL. PENAL CODE § 667.71 (amended by Chapter 446). *See generally id.* § 288 (West Supp. 1994) (providing a person shall be guilty of a felony for a lewd and lascivious act with a child under 14 years of age); People v. Loignon, 160 Cal. App. 2d 412, 420, 325 P.2d 541, 545 (1958) (stating that the terms in California Penal Code § 288 are not unconstitutionally vague).

8. *See* CAL. PENAL CODE § 207 (West Supp. 1994) (defining kidnapping).

9. *See* People v. Bradley, 15 Cal. App. 4th 1144, 1154, 19 Cal. Rptr. 2d 276, 283 (1993) (maintaining that inferences may be made to determine intent in the words spoken and conduct of the accused) *rev. denied*, 1993 Cal. App. LEXIS 535 (1993); *id.* (stating that intent is found when the defendant sets out to use whatever force necessary to complete the sexual act against the will of the victim); People v. Bryant, 10 Cal. App. 4th 1584, 1595-96, 13 Cal. Rptr. 2d 601, 606 (1992) (explaining that additional facts must be proven if the defendant does not admit that his or her intent was to perform a sexual act); *id.* at 1601, 13 Cal. Rptr. at 610 (stating that if there is intent to commit the sexual act, the court must sentence the offender under the proper provision dealing with intent to commit the sexual act).

10. CAL. PENAL CODE § 667.71(a) (amended by Chapter 446); *see id.* § 289 (West Supp. 1994) (defining rape by an instrument).

11. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2261, at 2 (May 17, 1994); *see* Hendking v. Smith, 781 F.2d 850, 852 (11th Cir. 1986) (stating that sex offenders experience a continual recurring physiological urge, therefore requiring the imposition of effective restraint); *see also* Ken Chavez, *Wilson, Lungren: Keep "Career Criminals" in Jail*, SACRAMENTO BEE, Dec. 7, 1993, at A3 (discussing Governor Pete Wilson's promises to revamp sentencing laws to keep habitual offenders in prison); *id.* (stating that Governor Pete Wilson believes criminals should not be rewarded for "good time").

12. Jake Henshaw, GANNETT NEWS SERV., Dec. 6, 1993, *available in* LEXIS, News Library, Curnws File; *see id.* (reporting the Sonoma County Sheriff's statement that the apprehension of a recent parolee, Richard Allen Davis, the suspected kidnapper and murderer of Polly Klaas, was a law enforcement success, but a failure of the current justice system).

the definition of habitual sexual offender.[13] An additional problem is the difficulties law enforcement agents have in keeping track of these offenders.[14]

Critics of Chapter 446 argue that, because habitual sexual offenders do not have a classic mental illness, they cannot be treated.[15] One jurisdiction maintains that habitual sexual offenders possess a type of mental abnormality that is unamenable to treatment.[16] Therefore, violent sex offenders cannot be cured, especially involuntarily.[17] Due to this abnormality, the individual is more likely to engage in predatory acts of sexual violence.[18]

However, proponents believe that the State should try to rehabilitate these offenders.[19] By taking measures to treat these offenders now, there will be a better chance to develop effective treatment in the future.[20]

*Decio C. Rangel, Jr.*

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13. *See* CAL. PENAL CODE § 13885 (West Supp. 1994) (providing the Legislature's finding that a substantial and disproportionate amount of sexual offenses are committed by a relatively small number of repeat offenders); Rob Haeseler, *Polly Was Among 85,361 Missing Across U.S.*, S.F. CHRON., Dec. 7, 1993, at A4 (providing that throughout the state of California alone, there are 54,000 sex offenders and 6000 serious habitual offenders and that kidnappings are among the hardest crimes to solve because of the lack of physical evidence and lack of contact with the kidnapper).

14. Don Martinez, *Sex-offender Database Has Difficulties California Often Fails to Keep List Updated*, DALLAS MORNING NEWS, Jan. 23, 1994, at 1A; *see id.* (stating that the number of sex offenders in California, currently numbered at 64,397, is likely to be inaccurate because offenders fail to notify the authorities as they move around); *id.* (challenging that the database tracking sexual offenders is only 24% accurate).

15. Norm Maleng, *Law Gives Public Right to Treat Sex Offenders*, SEATTLE TIMES, Aug. 24, 1993, at B5. *But see id.* (providing that statements regarding the ineffectiveness of treatment misses the point, which is that these individuals are not rational people and suffer from mental abnormalities and personality disorders which drive them to commit acts too horrible to contemplate by the rest of society).

16. WASH. REV. CODE §§ 71.09.010-.902 (West 1992 & Supp. 1994); *see id.* (laying out the Community Protection Act that allows the state of Washington to commit habitual offenders against their will, even after they have served their sentences); *see also In re* Personal Restraint of Young, 857 P.2d 989, 996-1004 (Wash. 1993) (concluding that Washington Revised Code §§ 71.09.010-.902 does not violate the Due Process Clause of the United States Constitution because of the dangerous nature of the offenders); *id.* (commenting that the uniqueness of this law is that it uses civil law to address the dangerous mental illness aspects of the habitual offender); Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213 (1991) (discussing Washington's violent sexual predator law and relevant United States Constitutional issues); Note, *Hate is Not Speech: A Constitutional Defense of Penalty Enhancement For Hate Crimes*, 106 HARV. L. REV. 1314 (1993) (discussing the constitutionality of sentence enhancement for hate crimes); Robb London, *Strategy on Sex Crimes is Prison, then Prison*, N.Y. TIMES, Feb. 8, 1991, at B16 (discussing habitual sexual offenders and civil commitments).

17. *In re Young*, 857 P.2d at 1003.

18. *Id.*

19. *London, supra* note 16; *see also In re Young*, 857 P.2d at 1003 (examining the Washington Community Protection Act, and stating that just because an illness is difficult to treat does not mean that it is not an illness and, therefore, untreatable and that the facilities are compatible with treatment and not prison).

20. *London, supra* note 16.

**Crimes; harassment of children**

Penal Code § 11414 (new).
AB 3592 (Umberg); 1994 STAT. Ch. 529

Under existing law, a person[1] who willfully,[2] maliciously[3] and repeatedly follows or harasses another person and makes a credible threat so as to put that person in reasonable fear of his or her safety, will be guilty of the crime of stalking.[4] Existing law also provides that a person who molests or annoys[5] any child under the age of eighteen[6] will be fined not more than $1000 and/or imprisoned for up to one year.[7]

Chapter 529 provides that any person who harasses[8] the child or ward[9] of another because of the other's occupation will be guilty of a misdemeanor.[10] A

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1. *See* CAL. PENAL CODE § 313(c) (West Supp. 1994) (defining person).
2. *See* CAL. PENAL CODE § 7 (West 1988) (defining willfully).
3. *See id.* (defining maliciously).
4. *Id.* § 646.9 (West Supp. 1994); *see id.* (providing a penalty of imprisonment for not more than one year, or by a fine not more than $1000 for the crime of stalking). *See generally* Jennifer L. Miller, Review of Selected 1993 California Legislation, *Crimes; Stalking*, 25 PAC. L.J. 368, 595-600 (1994) (discussing California Penal Code § 646.9); Greg A. Ruppert, Review of Selected 1993 California Legislation, *Crimes; Sentence Enhancement—Credible Threat*, 25 PAC. L.J. 368, 584-85 (addressing sentence enhancement for the making of a credible threat).
5. *See* People v. Pallares, 112 Cal. App. 2d Supp. 895, 901, 246 P.2d 173, 176-77 (1952) (explaining that to annoy or molest carries the connotation of abnormal sexual motivation towards children).
6. *See id.* at 898-901, 246 P.2d at 175-76 (explaining that the meaning of "under the age of 18" refers to years and not days or months).
7. CAL. PENAL CODE § 647.6 (West 1988); *see* People v. Carskaddon, 49 Cal. 2d 423, 426, 318 P.2d 4, 5 (1957) (providing that the test used to determine whether a party annoys or molests, for the purpose of California Penal Code § 647a, is to inquire as to whether the conduct was so lewd or obscene that a normal person would be irritated by it); *see also In re* Sheridan, 230 Cal. App. 2d 365, 373, 40 Cal. Rptr. 894, 898 (1964) (stating that the intent of the Legislature by allowing California Penal Code § 647a to remain in its original form is to condemn the conduct of molesting a child under the age of 18); *Pallares*, 112 Cal. App. 2d Supp. at 900, 246 P.2d at 176 (stating that the purpose of California Penal Code § 647a, is the protection of children from sexual offenders); *cf.* CAL. FAM. CODE § 6320 (West 1994) (authorizing the enjoining of a party from harassing another party).
8. *See* CAL. PENAL CODE § 11414(b)(2) (enacted by Chapter 529) (defining harass for the purpose of this section to mean knowing and willful conduct directed at a child that serves no legitimate purpose and is the type of conduct that would cause the reasonable child to suffer substantial emotional distress); *see also* CAL. FAM. CODE § 6320 (West 1994) (providing that the court may issue an ex parte order enjoining a party from contacting, molesting, attacking, threatening, sexually assaulting, battering, or contacting repeatedly by mail with the intent to harass or disturb the peace any family or household members on a showing of good cause).
9. *See* CAL. PENAL CODE § 11414(b)(1) (enacted by Chapter 529) (defining child or ward as any person under the age of 16).
10. *Id.* § 11414(a) (enacted by Chapter 529); *see also* CAL. CIV. PROC. CODE. § 527.6 (West Supp. 1994) (providing that a temporary restraining order may be issued to stop harassment); *cf.* CAL. FAM. CODE § 6320 (West 1994) (providing that the court has the power to enjoin behavior that amounts to harassment, threats, and violence); John Flynn Rooney, *Anti-Abortion Groups to Try New Tack on Dismissal of Rico Suit*, CHI. DAILY L. BULL., Mar. 28, 1994, at 3 (providing that a First Amendment argument will not protect anti-abortion groups from federal racketeering charges and that the threat of triple damages threatens to place anti-abortion organizations in financial ruin). *But see* John Gravois, *Abortion Foes Challenge New Clinic Blockade Law*, HOUS. POST, May 27, 1994, at A1 (quoting the director of Rescue America, Don Treshman, as saying

second conviction of this provision will be punishable by imprisonment for five days or more.[11] A third conviction will be punishable by imprisonment for at least thirty days.[12]

## COMMENT

The purpose of Chapter 529 is to prevent individuals from verbally harassing children, and causing them emotional distress.[13] Although Chapter 529 does not identify any particular group, it was initially introduced to protect children of health care providers who perform abortions.[14] Anti-abortion activists harass these children in an attempt to compel the parent or guardian of the child to stop performing the procedures.[15] Some activists openly believe that it is right to discuss with children, the occupation of their parents.[16] These groups often will invoke their First Amendment rights for protection in a conscious attempt to verbally harass.[17]

Chapter 529 raises a number of constitutional concerns because it restricts speech towards a specific group.[18] First, it is necessary to determine whether Chapter 529 is drafted so vaguely as to require persons of ordinary intelligence

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that Freedom of Access to Clinic Entrances Act (FACE) will have no effect on the tactics used by his organization to combat abortion).

11. CAL. PENAL CODE § 11414(c) (enacted by Chapter 529).

12. *Id.*

13. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3592, at 2 (July 5, 1994).

14. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3592, at 2 (Aug. 12, 1994).

15. *Id.*; *see id.* (stating that recently the debate over reproductive rights has become more violent and threatening, citing a Clinic Violence Survey Report compiled by the Feminist Majority Foundation, which found that anti-abortion violence is prevalent throughout the country, and providing several incidents where children were harassed, including one situation where the life of a child was threatened so she could "see how it felt"); Sandra G. Boodman, *Abortion Foes Strike at Doctors' Home Lives; Illegal Intimidation or Protected Protest?*, WASH. POST, Apr. 8, 1993, at A1 (providing statistics compiled by the National Abortion Federation in conjunction with local, state, and federal law enforcement agencies which show that a number of incidents of violence reported increased from 100 in 1990, to 667 in 1992); *see also id.* (describing tactics used by anti-abortionists to attempt to curb abortions including the targeting of children, harassing telephone calls, and destruction of property); *Gravois*, *supra* note 10, at A1 (discussing a First Amendment attack on FACE, and providing a statement by President Clinton that the murdered doctor David Gunn, by a anti-abortion activist, denied Gunn the right to be a father in his lifetime, which is not a pro-life position); Cynthia Hubert, *Abortion Foes Targeting San Jose*, SACRAMENTO BEE, July 9, 1993, at A1 (discussing tactics that will be used as abortion activists converge on northern California abortion clinics, including harassing letters, and blockades, picketing, prayer vigils, and confronting doctors directly and referring to Michael Frederick Griffin's murder of David Gunn). *See generally* JOSEPH M. SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTION (1985) (outlining tactics that may be used to stop doctors from performing abortions including residential picketing and covert surveillance). *But see Boodman, supra*, at A1 (providing that some groups oppose verbal harassment of clinic employees or their children including the National Conference of Catholic Bishops).

16. *See Boodman, supra* note 15, at A1 (providing statements by Joseph M. Scheidler that it is all right to talk to adolescents about what their parents do).

17. *See id.* (providing statements by Randall A. Terry, the founder of Operation Rescue, depicting his organization's intent to torment and disgrace doctors, which he considers to be its right).

18. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3592, at 3 (July 5, 1994). *See generally* New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (stating that there is a profound national commitment that debate on public issues should be uninhibited, robust and wide open).

to differ as to the meaning of its provision.[19] Second, one must inquire whether the regulated speech has any social value and whether, its very utterance would tend to incite violence.[20] Finally, in order to assess Chapter 529's constitutionality, it is necessary to determine whether the state's interest in the protection of minors outweighs the abortion activists' interests in disseminating their views.[21]

Although Chapter 529 regulates speech which, according to the Legislature, serves no legitimate purpose,[22] Chapter 529 may be found unconstitutional because it is aimed at anti-abortion groups.[23] In *Collin v. Smith*,[24] the court declared that the First Amendment prohibits the Government from restricting expression because of its message, ideas, subject matter, or content.[25] The court reasoned that the competition of ideas is necessary to stimulate thought.[26] The court reviewed an injunction that prohibited a fascist organization from demonstrating and determined that however repulsive an idea may be, its repulsiveness will not justify its suppression.[27]

Chapter 529 may fail constitutionally if it is found to be too vaguely drafted and if its provisions are not clearly defined.[28] In *Grayned v. City of Rockford*,[29] the court reasoned that an anti-noise ordinance regulating picketing in front of schools was not unconstitutionally vague by examining three policy considerations.[30] First, the court declared that a person of ordinary intelligence must be given a reasonable opportunity to understand what is prohibited.[31] Second, the statute must contain specific standards to avoid arbitrary and indiscriminate law enforcement.[32] Finally, the court stated that if a regulation involves the First

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19. *See infra* notes 22-43 and accompanying text (determining whether ordinary person may differ as to the meaning of Chapter 529); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3592, at 3 (July 5, 1994) (stating that despite a narrowing, Chapter 529, still may not pass constitutional muster).

20. *See infra* notes 44-62 and accompanying test (determining whether the speech regulated by Chapter 529 is protected because it tends to incite violence).

21. *See infra* notes 63-72 and accompanying text (providing incidents where the Court has restricted speech for minors, but not for adults).

22. *See* CAL. PENAL CODE § 11414(b)(2) (enacted by Chapter 529) (providing that the speech regulated must be of no legitimate purpose).

23. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3592, at 3 (July 5, 1994) (stating that Chapter 529 is targeted at anti-abortion groups who harass children of employees of abortion clinics in an attempt to get their parent to stop performing the procedures).

24. 578 F.2d 1197 (7th Cir. 1978).

25. *Collin*, 578 F.2d at 1202.

26. *Id.*

27. *Id.* at 1203; *see* Village of Skokie v. National Socialist Party of America, 373 N.E.2d 21, 24-25 (Ill. 1978) (stating that speech will not be found unconstitutional simply because it is unpleasant to the listener).

28. *See* Houston v. Hill, 482 U.S. 451, 456 (1987) (stating that the wording of the statute must put a person of reasonable intelligence on notice of what actions are forbidden).

29. 408 U.S. 104 (1972).

30. *Grayned*, 403 U.S. at 108-09.

31. *Id.* at 108.

32. *Id.* at 108-09.

Amendment right to free speech, and the law is unclear, individuals will steer farther away from the unlawful zone than necessary.[33]

Under Chapter 529, the term "harassment" is used to describe when an offender "alarms, annoys, torments, or terrorizes" another.[34] It is unclear whether speech about abortion is considered "harassment."[35] In *Grayned*, the Court held that an anti-noise ordinance relating to picketing at schools was not unconstitutionally vague.[36] The Court in *Grayned* focused on the language of the statute and concluded that forbidding a person who "shall wilfully make or assist in the making or any noise or diversion which disturbs or tends to disturb the peace or good order of such school" was clear.[37] Chapter 529's language is not as specific as that of the statute at issue in *Grayned*.[38] In *Houston v. Hill*,[39] the Court examined a statute which provided that it was impermissible to "oppose, molest, abuse, or interrupt any police officer," and concluded that this language was constitutional.[40] The rationale behind the conclusion was that a certain amount of expressive disorder is both inevitable and protected under our notions of freedom.[41] Chapter 529's language appears similar to the language of the statute in *Houston*.[42] As in *Houston*, the court is likely to conclude that a certain amount of information, although disorderly, is protected.[43] Because both *Grayned* and *Houston* are constitutional, and Chapter 529's language is no less vague, it will most likely be found constitutional.

Secondly, if the speech regulated by Chapter 529 is not protected by the First Amendment, then regulation will be constitutional.[44] Speech will not be protected if it is first, of little social value, and second, has the potential to create a breach

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33. *Id.* at 109.

34. *See* CAL. PENAL CODE § 11414(b)(2) (enacted by Chapter 529) (providing that prohibited language must be "willful" and must alarm, annoy, torment, or terrorize the child); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3592, at 4 (July 5, 1994) (considering whether changing "willful" to "malicious," and deleting "alarm" and "annoy" would make Chapter 529 clearer). *See generally*, Bachowski v. Salamone, 407 N.W.2d 533, 538-39 (Wis. 1987) (holding that language of having an intent to harass with no legitimate purpose is not unconstitutionally vague); State v. Sarlund, 407 N.W.2d 544, 545 n.1 (Wis. 1987) (providing accounts of what constitutes harassment for the purposes of a telephone harassment statute). *But see* People v. Smith, 862 P.2d 939, 942-43 (Colo. 1993) (concluding that a lower court holding that a Colorado harassment statute as over-broad is supported by other jurisdictions).

35. *See* CAL. PENAL CODE § 11414 (enacted by Chapter 529) (lacking language to specify whether abortion debate language is considered); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3592, at 5 (July 5, 1994) (providing that there have been several instances where abortion activists have harassed children of employees who work at health care clinics that provide abortions).

36. *Grayned*, 408 U.S. at 112.

37. *Id.* at 111-12.

38. CAL. PENAL CODE § 11414 (enacted by Chapter 529).

39. 482 U.S. 451 (1987).

40. *Houston*, 482 U.S. at 472.

41. *Id.*

42. CAL. PENAL CODE § 11414 (enacted by Chapter 529).

43. *Houston*, 482 U.S. at 472.

44. *See* Thorne v. Bailey, 846 F.2d 241, 243 (4th Cir. 1988) (providing that harassing speech is not protected because it is not communication).

of the peace.[45] This form of unprotected speech is called "fighting words."[46] In *Chaplinsky v. New Hampshire*,[47] a state's ability to regulate certain speech was upheld when the Supreme Court declared that fighting words, speech which by its very utterance inflicts injury or tends to incite an imminent breach of the peace, is not protected under the First Amendment.[48] The Court later declared in *Cantwell v. Connecticut*,[49] that in order for communication of information or opinion to be protected by the Constitution, it cannot be personally abusive.[50] This doctrine was subsequently narrowed in *Gooding v. Wilson*,[51] when the Court declared that the words must have a direct tendency to cause acts of violence to be classified as fighting words.[52]

In determining whether speech constitutes fighting words, one must first find that the content of the speech is of no merit.[53] It probably will be difficult to maintain that the debate over abortion is of no value.[54] In *Roe v. Wade*,[55] the Court stated that the constitutional right to privacy and right to make a choice regarding abortion, does not include the right to be completely free from government regulation.[56] The Supreme Court has refused to make a value judgment on the issue of abortion.[57] This right is a burning issue of a national scope.[58] The speech that Chapter 529 seeks to curb is speech against abortion, when it is aimed at children.[59] Therefore, the speech regulated is valuable, and as a result, Chapter 529 will not be able to rely on *Chaplinsky* unless it is the type of speech that incites violence.

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45. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (distinguishing a specific category of speech which is not protected because the speech does not disseminate ideas of significant social value).

46. *See* Cohen v. California, 403 U.S. 15, 20 (1971) (defining fighting words as personally abusive epithets which, when directed towards an ordinary citizen, are likely to provoke a violent reaction).

47. 315 U.S. 568 (1942).

48. *Chaplinsky*, 315 U.S. at 572; *see Cohen*, 403 U.S. at 26 (holding that wearing a jacket with the words "Fuck the Draft" did not constitute fighting words); *id.* at 24 (reasoning that free speech is powerful medicine in a society as diverse as ours and therefore, we want to encourage public discussion).

49. 310 U.S. 296 (1940).

50. *Cantwell*, 310 U.S. at 309-10; *see id.* at 311 (holding that a statute regulating solicitation by an organization that was not recognized by the Secretary of the Public Welfare Council was unconstitutional).

51. 405 U.S. 518 (1972).

52. *Gooding*, 405 U.S. at 523; *cf.* Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978) (holding that speech advocating Nazism is not the type that incites violence).

53. R.A.V. v. St. Paul, 112 S. Ct. 2538, 2542-43 (1992).

54. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3592, at 3 (July 5, 1994).

55. 410 U.S. 113 (1973).

56. *Roe*, 410 U.S. at 163; *see id.* (concluding that the right to privacy includes abortion decision, is not unqualified and must be considered against important state values).

57. *See* Thornberg v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 (1986) (providing that the abortion decision should be made by the individual in the unrestrained imposition of its own extra-constitutional value preferences).

58. People v. McCumber, 499 N.E.2d 139, 141 (Ill. App. 1986); *see id.* (stating that the court will not express personal views on the issue of abortion).

59. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3592, at 3 (July 5, 1994) (stating that Chapter 529 arose because of reports on the increase of violence in the abortion debate).

One must then determine whether the speech regulated by Chapter 529 is the type of speech that will create a breach of the peace.[60] Chapter 529 regulates the harassment of children which may seem annoying and crude to the listener, but will not likely incite violence, and therefore, should not be classified as fighting words.[61] Although a person may be hurt emotionally by such expression, the expression is nonetheless protected by the First Amendment.[62]

The final inquiry as to Chapter 529's constitutionality is based upon a two-part test. First, the court will ask whether the state interest in protecting minors is compelling.[63] A democratic society depends on the healthy, well-rounded growth of its young people into full maturity as citizens.[64] Case law has provided that speech directed towards adults that is protected under the Constitution is not always afforded the same protection when directed towards minors.[65] In *Roth v. United States*,[66] the Court upheld the authority of a state to regulate obscene material directed towards children by declaring that obscenity is not protected by the freedom of speech found under the First and Fourteenth Amendments.[67] This view was broadened in *Ginsberg v. New York*,[68] when the Court announced that a state may constitutionally restrict the access of minors to material that would not be denied to adults.[69] The Court went on to explain that since parental authority over their children is a constitutionally recognized foundation of our society, and because parents are not always present to exercise this control, the state has an independent interest in the welfare of its youth.[70] Therefore, although Chapter 529 may not regulate speech if it is protected when directed towards adults, the speech may be regulated when directed towards children.

Second, the means to achieve its purpose, the protection of children, is narrowly tailored to further that interest.[71] The words of the statute focus upon children, and only prescribe speech that is of no legitimate purpose.[72] This will not likely be found so overly broad so as to be invalid.

In conclusion, Chapter 529 will most likely be found constitutional unless the speech deals with abortion, speech upon which our society places a large value.

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60. *See Chaplinsky*, 315 U.S. at 572 (providing that the speech must be the type that incites violence to be considered fighting words).

61. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3592, at 3 (July 5, 1994).

62. United States v. Eichman, 496 U.S. 310, 319 (1990).

63. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

64. Prince v. Massachusetts, 321 U.S. 158, 168 (1944); *see id.* at 169-71 (reasoning that a statute that prohibits using children to distribute literature on the street is valid).

65. Ginsberg v. New York, 390 U.S. 629, 637 (1968).

66. 354 U.S. 476 (1957).

67. *Roth*, 354 U.S. at 481.

68. 390 U.S. 629 (1968).

69. *Ginsberg*, 390 U.S. at 638.

70. *Id.* at 639-40.

71. Perry Educ. Assn., v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983); *see* Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) (stating that the provision must be narrowly tailored to further the interest of the state).

72. CAL. PENAL CODE § 11414(b)(2) (enacted by Chapter 529).

The language of the statute is drafted narrowly enough so that a person of ordinary intelligence will understand what it means. Furthermore, the type of language at issue does not involve fighting words because abortion speech directed towards a child is not the type that incites violence. Finally, the state interest in the protection of minors is large, which will provide a good basis to hold Chapter 529 valid.

*Decio C. Rangel, Jr.*

**Crimes; harmful matter—sale through telephone or vending machine**

Penal Code § 313.1 (amended).
AB 17 (Peace); 1993 STAT. Ch. 38

Existing law prohibits a person[1] from knowingly[2] selling, renting, exhibiting,[3] or otherwise distributing[4] to minors[5] any harmful matter,[6] including telephone messages.[7] Existing law further prohibits the knowing sale or display, in coin or slug-operated vending machines located in a public place from which minors are not excluded, of harmful matter containing pictorial representations of certain specified sexual acts.[8] Chapter 38 would extend this prohibition of sale or display in vending machines to any harmful matter.[9]

Existing law provides a defense to prosecution under this provision for the distribution of harmful matter by telephone if the defendant can show that he or she either required the receiver of the harmful matter to use an authorized access

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1. *See* CAL. PENAL CODE § 313(c) (West Supp. 1994) (defining person as any individual, partnership, firm, association, corporation, or other legal entity).
2. *See id.* § 313(e) (West Supp. 1994) (defining knowingly as being aware of the character of the matter).
3. *See id.* § 313(f) (West Supp. 1994) (defining exhibit as meaning "to show").
4. *See id.* § 313(d) (West Supp. 1994) (defining distribute as transferring possession of, whether with or without consent).
5. *See id.* § 313(g) (West Supp. 1994) (defining minor as any natural person under 18 years of age).
6. *See id.* § 313(a) (West Supp. 1994) (defining harmful matter as meaning matter which appeals to the prurient interest, depicts sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value for minors); *id.* § 313(b) (West Supp. 1994) (defining matter).
7. *Id.* § 313.1(a) (amended by Chapter 38).
8. *Id.* § 313.1(c)(1) (amended by Chapter 38); *see id.* (identifying the prohibited matter as photographs or pictorial representation of the commission of sodomy, oral copulation, sexual intercourse, masturbation, bestiality, or a photograph of an exposed penis in an erect and turgid state and providing that these acts are punishable as specified in California Penal Code § 313.4); *id.* § 313.4 (West Supp. 1994) (mandating that every person who violates California Penal Code § 313.1, other than subdivision (e), will be punished by a fine of not more than $2000, by imprisonment in the county jail for not more than one year, or by both). However, if the person has been previously convicted of a violation of § 313.1, other than of subdivision (e), or of §§ 311 through California Penal Code § 312.5, the person will be punished by imprisonment in the state prison. *Id.*
9. *Id.* § 313.1(c)(2) (amended by Chapter 38).

code or to pay by credit card before the material was transmitted.[10] Existing law also requires that the defendant must have taken reasonable measures to determine that the receiver was at least eighteen years of age before providing the access code, and have established a procedure to cancel the code after receiving notice that the code has been lost, stolen, used by minors, or is no longer desired.[11]

Chapter 38 provides a similar defense for the prosecution of persons for the placement of vending machines containing harmful matter in violation of this provision.[12] To utilize the defense created by Chapter 38, the defendant must show that he or she either required the user of such vending machines to use an authorized identification card in order to obtain the harmful matter or to use a token.[13] In addition, under Chapter 38, the defendant must have an established procedure of canceling the identification card upon notice that the card has been lost, stolen, used by minors, or is no longer desired.[14]

## COMMENT

Because Chapter 38 involves the restriction of access of a specified group of persons from a designated form of speech, it raises a number of constitutional issues.[15] The most important issues raised involve the state's interest in the protection of minors and the restriction of content-based speech by time, place, and manner regulations as an abridgment of the First Amendment's freedom of speech protection.[16]

Chapter 38 imposes a restriction on the dissemination of "harmful matter."[17] The Legislature defined the term by using the current definition of "obscene matter" and applying it to minors.[18] In *Roth v. United States*,[19] a state's authority to regulate obscene material was upheld when the Court declared that obscenity

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10. *Id.* § 313.1(g)(1)-(2) (amended by Chapter 38).
11. *Id.* § 313.1(g)(1) (amended by Chapter 38).
12. *Id.* § 313.1(h)(1) (amended by Chapter 38).
13. *Id.* § 313.1(h)(1)-(2) (amended by Chapter 38).
14. *Id.* § 313.1(g)(1) (amended by Chapter 38).
15. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 17, at 2 (Apr. 13, 1993) (stating that this bill touches on First Amendment considerations).
16. *Id.*
17. CAL. PENAL CODE § 313.1 (amended by Chapter 38).
18. *Compare id.* § 313(a) (West Supp. 1994) (defining harmful matter to mean matter that appeals to the prurient interest, depicts sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value *for minors)* (emphasis added) *with id.* § 311(a) (West Supp. 1994) (defining obscene matter to mean matter that appeals to the prurient interest, depicts sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value). *See generally*, U.S. v. Guglielini, 819 F.2d 451, 454 (4th Cir. 1987) (using the Miller test from Miller v. California, 413 U.S. 15, 24 to determine whether a word should be considered obscene).
19. 354 U.S. 476 (1957).

is not protected by the freedoms of speech and the press under the First Amendment for action by the Federal Government, nor under the Due Process Clause of the Fourteenth Amendment for actions by state governments.[20]

The Supreme Court later broadened the state's authority to regulate obscene material in *Ginsberg v. New York*,[21] in which the Court declared that a state could constitutionally restrict the access of minors to material that otherwise could not be denied to adults.[22] The case determined the validity of a New York statute prohibiting the sale to minors[23] of pictures, printed material, or sound recordings depicting nudity[24] or sexual conduct[25] that are harmful to minors.[26] The Court stated that although the magazine sold in violation of the statute was not obscene for adults, the power of the state to regulate the acts of minors is broader than its authority to restrict the acts of adults.[27] The Court stated that parents' claim to authority over their children is a constitutionally recognized foundation of our society and since parental guidance or control cannot always be present, the state has an independent interest in the welfare of its youth.[28] Thus, Chapter 38's restriction on the sale of harmful matter, since it was enacted to protect minors, should be valid.[29]

Statutes restricting minors' access to obscene material, however, may be held unconstitutional if they are vaguely drafted or if they do not require scienter[30] on

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20. *Roth*, 354 U.S. at 481; U.S. CONST. amends. I, XIV.

21. 390 U.S. 629 (1968).

22. *Ginsberg*, 390 U.S. at 637-37.

23. *See id.* at 645, app. A (defining "minor" to mean a person under the age of 17 (quoting N.Y. Penal Law § 484-h(1)(a))).

24. *See Ginsburg*, 390 U.S. at 645 (defining "nudity" to mean the showing of the human male or female genitals, pubic area or buttocks without a full opaque covering, or the showing of the female breast without a full opaque covering of any portion below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state (quoting N.Y. Penal Law § 484-h(1)(b))).

25. *See Ginsburg*, 390 U.S. at 646 (defining "sexual conduct" to mean acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or a female breast (quoting N.Y. Penal Law § 484-h(1)(c))).

26. *Id.* at 647 (quoting N.Y. Penal Law § 484-h(2))); *see id.* at 646 (defining "harmful to minors" to mean the quality of any description or representation of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse when it predominately appeals to the prurient or shameful interest of minors, is patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors, and is utterly without redeeming social importance to minors (quoting N.Y. Penal Law § 484-h(1)(f))); *id.* (defining "sexual excitement" as meaning the condition of human genitals in the state of sexual stimulation (quoting N.Y. Penal Law § 484-h(1)(d))); *id.* (defining "sado-masochistic abuse" as meaning the flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed (quoting N.Y. Penal Law § 484-h(1)(e))).

27. *Id.* at 634; *Id.* at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 n.6).

28. *Id.* at 639, 640.

29. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 17, at 2 (Mar. 24, 1994) (identifying the purpose of AB 17 as preventing children from purchasing harmful matter, in the form of adult tabloids, from vending machines).

30. *See* BLACK'S LAW DICTIONARY 1345 (6th ed. 1990) (defining scienter as meaning the defendant's prior knowledge of the cause responsible for the injury complained of, or rather his prior knowledge of a state of facts which it was his duty to guard against, and his omission to do which is responsible for the injury complained of). The term is frequently used to signify the defendant's guilty knowledge. *Id.*; *see also* Smith

the part of the violator.[31] Laws regulating speech without regard to its content are valid as long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication.[32] Regulations of speech on the basis of its content, however, presumptively violate the First Amendment.[33] In *City of Renton v. Playtime Theaters, Inc.*,[34] the Supreme Court upheld an ordinance that prohibited the location of an adult movie theater within 1000 feet of any residential area, church, park, or school.[35] The Court did so after determining the ordinance was content-neutral and passed an intermediate level of scrutiny.[36] The Court reasoned that the ordinance was aimed at preventing the secondary effects of having adult theaters in a certain location, namely urban blight, rather than at curtailing the freedom of expression, especially because the ordinance sought to regulate the location of adult theaters, not to restrict their numbers.[37]

On its face, Chapter 38 would seem to be a content-neutral restriction of speech because it does not remove the existence of harmful matter vending machines, but rather restricts their location.[38] However, since the underlying purpose of Chapter 38 is to protect minors from the effects of exposure to harmful matter, it is concerned with a minor's reactions to such material.[39] The Supreme Court, in *Boos v. Barry*,[40] held that direct listener's emotive reactions to regulated speech are not "secondary effects" referred to in *Renton*, and thus, restrictions aimed at controlling such reactions are content-based.[41] Therefore, Chapter 38 must be evaluated as a content-based restriction of speech and the *Renton* analysis does not apply.[42] Chapter 38, in order to overcome its presumptive violation of the

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v. California, 361 U.S. 147, 152 (1959) (giving as an example of scienter a case in which the court found that a bookseller's examination of a book was not necessary in proving his awareness of its contents).

31. *Smith*, 361 U.S. at 155.

32. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986).

33. *Id.*

34. 475 U.S. 41 (1986).

35. *Id.* at 48.

36. *Id.*

37. *Id.*

38. *See* Sebago, Inc. v. City of Alameda, 211 Cal. App. 3d 1372, 1384, 259 Cal. Rptr. 918, 923-24 (1989) (deciding whether an ordinance restricting newsracks from selling adult-oriented magazines was a content-neutral or content-based regulation, and holding that the ordinance was content-based and therefore invalid).

39. CAL. PENAL CODE § 313.1 (amended by Chapter 38); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 17, at 3 (Mar. 24, 1994) (stating that despite the Legislature's efforts, minors are still able to obtain harmful matter from newsracks on the street even though they cannot purchase the same material over the counter).

40. 485 U.S. 312 (1988).

41. *Id.*

42. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS of AB 17, at 2 (Apr. 13, 1993) (stating that the constitutionality of AB 17 must be evaluated under the standards for content-based regulations); *see also* City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1517 (1993) (holding that since an ordinance restricted the placement of newsracks based on the content of the publication sold in them, it was a content-based restriction); *Sebago*, 211 Cal. App. 3d. at 1384, 259 Cal. Rptr. at 923-24 (1989) (holding that a newsrack zoning ordinance aimed at protecting children from exposure to adult-oriented

First Amendment, must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end.[43] Since the state has an established compelling interest in protecting children from obscene material,[44] Chapter 38 will withstand constitutional scrutiny as long as it is narrowly drawn to bring about that interest.[45]

In order for a statute to be considered narrowly drawn for the purposes of constitutional analysis, the Supreme Court declared that only the least restrictive means may be used.[46]

Since Chapter 38 only regulates access to harmful matter vending machines and does not ban the machines themselves, it should meet the "narrowly drawn" standard set by the Supreme Court.[47] The materials may still be sold and

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newspapers was a content-based restriction of speech).

43. Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989); *see* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (holding that a state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling").

44. *Sable Communications*, 492 U.S. at 126 (providing that the state has a compelling interest in protecting the physical and psychological well-being of minors, and that this interest extends to shield minors from the influence of literature that is not obscene by adult standards); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (stating that the state has the constitutional power to regulate the well-being of its children). *But see Sebago*, 211 Cal. App. 3d at 1386, 259 Cal. Rptr. at 925 (stating that if a publication is not proven to be harmful to minors, there is no compelling state interest in protecting them from it).

45. *Sable Communications*, 492 U.S. at 126 (1989).

46. *Id.* at 126; *see id.* (providing that "the Government may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

47. CAL. PENAL CODE § 313.1 (amended by Chapter 38); *see Sable Communications*, 492 U.S. at 119 (providing that the state "unquestionably has a legitimate interest" in protecting children from indecent messages on "dial-a-porn messages," but holding that the legislation was not narrowly drawn because it was a "flat-out" ban on indecent speech); Butler v. Michigan, 352 U.S. 380, 383 (1956) (holding that a statute that bans the sale of books with obscene language is not narrowly enough drawn since it would reduce adults to reading only what is fit for children); *see also* New York v. Ferber, 458 U.S. 747, 754 (1982) (discussing obscenity and holding that "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem). These include the "lewd and obscene" since "such utterances are no essential part of any exposition of ideas." *Id.* "[A]ny benefit that may be derived from them is clearly outweighed by the social interest in order and morality". *Id.* (quoting Chaplinski v. New Hampshire, 315 U.S. 568, 571-72 (1942)). *But see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 17, at 6 (Feb. 1, 1994) (identifying the opposition's claim that this bill places an undue burden on distribution of these types of materials and that regulations already exist that sufficiently protect minors from harmful matter).

purchased legally in all locations and only minors would be unable to gain access to them.[48]

*Kenneth J. Pogue*

## Crimes; home detention programs—alternative to confinement

Penal Code §§ 1203.016, 1208.2, 1208.3, 1208.5, 2900.5 (amended).
AB 152 (Rainey); 1994 STAT. Ch. 770

Existing law provides any county board of supervisors with the authority to allow the correctional administrator[1] to offer a program in which minimum security inmates,[2] low-risk offenders[3] committed to a county correctional facility, and certain inmates participating in a work furlough program[4] may voluntarily participate in a home detention program,[5] rather than be confined in the county correctional facility.[6]

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48. Gluck v. County of Los Angeles, 93 Cal. App. 3d 121, 125, 155 Cal. Rptr. 435, 437 (1979) (holding that a county ordinance was narrowly constructed since it "is specifically drafted to prevent only obstruction of travel, to avoid danger from defective racks, and to protect persons from unwilling exposure to explicit sexual material which is likely to be offensive to the unwilling viewer"); *Sebago, Inc.* 211 Cal. App. 3d 1372, 1386-87, 259 Cal. Rptr. 918, 925 (1989) (holding that an ordinance restricting the use of public newsracks for adult oriented newspapers was unconstitutional since it was "so broad in scope as to apply to all manner of benign publications); *see* CAL. PENAL CODE § 313.1 (amended by Chapter 38). *See generally Ferber,* 458 U.S. at 772 (stating that a "sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation"); *id.* at 774 (O'Connor, J. concurring) (stating that "[t]he audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm").

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1. *See* CAL. PENAL CODE § 1203.016(h)(1) (amended by Chapter 770) (defining correctional administrator as a sheriff, probation officer, or director of the county department of corrections).

2. *See id.* § 1203.016(h)(2) (amended by Chapter 770) (defining minimum security inmate as an inmate who, by established local classification criteria, would be eligible for placement in a Type IV local detention facility, as described in the California Code of Regulations, or for placement into the community for work or school activities, or who is found to be a minimum security risk under a classification plan determined pursuant to California Code of Regulations § 1050).

3. *See id.* § 1203.016(h)(3) (amended by Chapter 770) (adopting the National Institute of Corrections model probation system definition of low-risk offender as meaning a probationer).

4. *See id.* § 1208 (West Supp. 1994) (describing the prisoners' work furlough program).

5. *See id.* § 1203.016 (amended by Chapter 770) (discussing the home detention program); *see also* WASH. REV. CODE ANN. § 9.94A.180 (West 1988 & Supp. 1994) (discussing aspects of the home detention program).

6. CAL. PENAL CODE § 1203.016(a) (amended by Chapter 770); *see* Miguel Bustillo, *Electronic Bracelets to be Tried on Juvenile Offenders; Adult Monitoring Program Scrapped After Jail Inmates Refused to Volunteer,* L.A. TIMES, Aug. 2, 1994, at B1 (stating that in an effort to ease overcrowding at correctional facilities, low-risk juvenile offenders will be permitted to participate in the home detention program in lieu of incarceration); Andrew Grene, *County Gets Grant for Juvenile Detention System,* CHI. DAILY L. BULL., Nov.

Chapter 770 allows minimum security inmates and low-risk offenders who have been granted probation to voluntarily participate in a home detention program during their sentence under the direction of a probation officer, rather than being confined.[7]

Existing law states that a participant in a home detention program must agree that the correctional administrator may, without further order of the court, immediately remand that individual to custody in order to serve the balance of his or her sentence if: (1) The electronic monitoring or supervising devices are unable for any reason to properly perform their function at the designated place; (2) the person fails to remain within the place of home detention as has been stipulated in the agreement; or (3) for any other reason, the individual no longer meets the established criteria for release under the provision.[8]

Chapter 770 adds the provision that a participant in a home detention program must agree that the correctional administrator may, without further order of the court, immediately retake him or her into custody in order to serve the balance of his or her sentence if the individual willfully fails to pay fees[9] to the provider of the electronic home detention service.[10]

Existing law provides that an individual will be eligible to participate in a home detention program only if the correctional administrator concludes that the person meets the specified criteria for supervised release.[11]

Chapter 770 also requires that in order for the person to be eligible to take part in a home detention program, the participation of the person must be consistent with all reasonable rules and regulations prescribed by the board of supervisors or with the administrative policy of the correctional administrator.[12] Additionally, Chapter 770 provides that the rules, regulations, and the administrative policy of the program must be written and annually reviewed by the board of supervisors and the correctional administrator.[13] A copy of the rules and regulations must be given or made available to any participant, upon request.[14] In the event that any participant who has been recommended or referred by the court is denied or removed from participation in the program, that participant will be provided with

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24, 1992, at 1 (stating that Cook County received a $75,000 grant to study alternatives to juvenile incarceration). This study will include an examination of California's home detention program. *Id.*

7. CAL. PENAL CODE § 1203.016(a) (amended by Chapter 770); *see id.* (extending the home detention option to those individuals who have been granted probation).

8. *Id.* § 1203.016(b)(4) (amended by Chapter 770).

9. *See id.* § 1208.2 (amended by Chapter 770) (providing for the payment of certain fees by the individual taking part in the home detention program to the provider of the electronic monitoring equipment).

10. *Id.* § 1203.016(b)(4) (amended by Chapter 770).

11. *Id.* § 1203.016(d) (amended by Chapter 770); *see* People v. Superior Court, 230 Cal. App. 3d 287, 298-99, 281 Cal. Rptr. 309, 316-17 (1991) (stating that the probation officer, as opposed to the sentencing judge, is authorized to determine if the defendant is eligible to participate in a home detention program).

12. CAL. PENAL CODE § 1203.016(d) (amended by Chapter 770).

13. *Id.* § 1203.016(d)(1) (amended by Chapter 770).

14. *Id.*

a notice of the denial or removal, and the notice must include the participant's appeal rights, as established by program administrative policy.[15]

Chapter 770 specifies that the police department of a city where an office is located to which those individuals in an electronic monitoring program report may require the county correctional administrator to give specified information concerning those persons for the purpose of monitoring the impact of home detention programs on the community.[16] Additionally, Chapter 770 authorizes the correctional administrator of a home detention program to contract with an appropriate public or private agency or entity to provide specified program services.[17] Furthermore, Chapter 770 states that the contract must be in writing[18] and must contain, among other things, provisions which: (1) Relate to the respective responsibility and liability of the county and private agency or entity; (2) require the private agency or entity to provide evidence of financial responsibility in amounts and under conditions sufficient to fully indemnify the county for public liability which is reasonably foreseeable, which may arise from, or be proximately caused by, the acts or omissions of the contractor; and (3) require the private agency or entity to set forth evidence of financial responsibility, or the contractor may be terminated.[19]

Existing law provides procedures which authorize a board of supervisors that implements a work furlough program, electronic home detention program, or county parole program to impose a program administrative and application fee, charged by the administrator, based upon the prisoner's ability to pay.[20] Chapter 770 exempts privately operated home detention programs from specified maximum limits on the administrative fee.[21] Chapter 770 also requires the administrator of a work furlough or home detention program, to ensure that these fee provisions are contained in any contract with a private agency or entity to provide specified program services.[22] Prior law stated that these provisions were effective until January 1, 1995, on which date they were to be repealed.[23] Chapter 770 postpones the repeal date of these provisions until January 1, 1999.[24]

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15. *Id.* § 1203.016(d)(2) (amended by Chapter 770); *see* People v. Superior Court, 230 Cal. App. 3d 287, 298, 281 Cal. Rptr. 309, 316 (1991) (stating that the sentencing judge only has the right to restrict or deny the defendant's participation in a home detention program, or to recommend that the defendant be allowed to participate in the program, but has absolutely no authority to direct or order the placement of the defendant in a home detention program).

16. CAL. PENAL CODE § 1203.016(i) (amended by Chapter 770).

17. *Id.* § 1203.016(j)(1) (amended by Chapter 770).

18. *See id.* (providing that a written contract is not required for the use of electronic monitoring by the California Department of Corrections or the Department of the Youth Authority, as established in California Penal Code § 3004).

19. *Id.* § 1203.016(j)(B)(i)-(iii) (amended by Chapter 770).

20. *Id.* § 1208.2(b) (amended by Chapter 770).

21. *Id.* § 1208.2(b)(2) (amended by Chapter 770).

22. *Id.* § 1208.2(j) (amended by Chapter 770).

23. 1992 Cal. Legis. Serv. ch. 427, sec. 131, at 1385 (amending CAL. PENAL CODE § 1208.2(i)).

24. CAL. PENAL CODE § 1208.2(k) (amended by Chapter 770).

Existing law prohibits the administrator of a home detention program, work furlough program, or county parole program from considering the prisoner's ability to pay[25] the fees for the purposes of granting or denying participation in any of the programs.[26] Additionally, existing law specifies that this provision does not prohibit the administrator from verifying certain information relating to the prisoner's employment.[27] Prior law stated that these provisions would be repealed on January 1, 1995.[28] Chapter 770 extends these provisions until the repeal date of January 1, 1999.[29]

Existing law authorizes the board of supervisors of two or more counties having one or more of the programs (work furlough, county parole, or home detention) to enter into agreements whereby a person who has been sentenced or imprisoned in the jail of one county, but is regularly employed in another county, may be transferred from the custody of the appropriate county officials of the county in which the prisoner has been confined to the custody of the appropriate county official of the county in which the prisoner resides or is employed.[30] Under prior law, this provision was effective only until January 1, 1995, on which date it would be repealed.[31] Chapter 770 extends the repeal date of the former provision until January 1, 1999, and delays the operative date of the alternative provision until January 1, 1999.[32]

Existing law specifies sentencing procedures under which a defendant who has been in custody in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile facility, or a similar residential institution is given credit to his or her term of imprisonment, equal to the time of all days of custody in those facilities.[33]

Chapter 770 extends this provision to allow credit for the time spent in home detention facility, and notes that if a defendant serves time in one of the specified facilities or programs instead of imprisonment in a county jail, and the statute under which the defendant is sentenced requires a mandatory minimum period of time in jail, then the time which has been spent in these facilities will qualify as serving the mandatory jail time.[34]

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25. *See id.* § 1208.2(e) (amended by Chapter 770) (defining ability to pay as the overall capability of the person to reimburse the costs, or a portion of the costs); *id.* § 1208.2(e)(1)-(4) (amended by Chapter 770) (setting forth factors to consider when determining one's ability to pay).

26. *Id.* § 1208.2(d) (amended by Chapter 770).

27. *Id.* § 1208.3(a)-(c) (amended by Chapter 770).

28. 1991 Cal. Legis. Serv. ch. 437, sec. 6, at 1959 (enacting CAL. PENAL CODE § 1208.3).

29. CAL. PENAL CODE § 1208.3(d) (amended by Chapter 770).

30. *Id.* § 1208.5 (amended by Chapter 770).

31. 1992 Cal Legis. Serv. ch. 427, sec. 132, at 1385 (amending CAL. PENAL CODE § 1208.5).

32. CAL. PENAL CODE § 1208.5 (amended by Chapter 770).

33. *Id.* § 2900.5(a) (amended by Chapter 770).

34. *Id.*; *see* People v. Lapaille, 15 Cal. App. 4th 1159, 1168-70, 19 Cal. Rptr. 2d 390, 395-97 (1993) (explaining that failing to award custody credits to a defendant placed under house arrest on his own recognizance prior to sentencing, while awarding custody credits to those individuals confined in a post-sentence electronic home detention program, violated equal protection). *But see id.* at 1170-73, 19 Cal. Rptr. 2d at 397-99 (1993) (stating that denying conduct credits for a defendant's pre-sentence confinement pursuant

Chapter 770 extends the repeal date for the above provisions to January 1, 1999, rather than January 1, 1995, and also explains that nothing in these provisions with regard to time credits for sentenced convicted offenders may be interpreted as authorizing the sentencing of convicted offenders to any of the facilities or programs mentioned therein.[35]

## COMMENT

The Legislative intent behind Chapter 770 focuses on the reconfiguration of the State's law with regard to the proper regulation of home detention programs.[36] The Legislature decided that establishing clear standards for all home detention programs (public and private), will safeguard against possible abuses by anyone associated with the programs.[37] Home detention has proven to be an effective and cost-efficient alternative to more traditional methods of incarceration, and has proven to be a mode of relief to overcrowded local correctional facilities.[38] Additionally, the program allows participants to continue in their employment, education, or rehabilitative endeavors within the context of their normal lives.[39]

By freeing the cell space in jails and prisons to make room for violent offenders, and by allowing minimum security inmates and low-risk offenders to continue with their employment and education, society benefits to a greater extent than if these low-risk offenders remained in prison.[40] Thus, Chapter 770 conserves a scarce societal resource, cell space, and maximizes social utility by reserving the space for the appropriate dangerous offenders.[41]

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to house arrest, while granting such credits to those confined in penal institutions, did not violate equal protection).

35. CAL. PENAL CODE § 2900.5(g)-(h) (amended by Chapter 770).

36. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 152 at 3 (June 14, 1994).

37. *See id.* (proclaiming the added benefit to these home detention systems and their participants from clear standards with regard to the regulation and administration of these programs).

38. *Id.* at 4; *see Bill Would Send Home Elderly Prisoners*, THE RECORDER., May 4, 1994, at A6 (discussing a New York bill which would establish an early parole system for low-risk inmates 60 years of age and older). After a stringent review process, some individuals would be released outright, while others would be assigned to an electronic home detention program. *Id. See* Marc Powell, *Jail at Home Delights Renton Man*, NEWS TRIB., Sept. 19, 1994, at B1 (examining a case in which a man who could have been sentenced to two months in jail had been allowed to participate in a home detention program, whereby he was able to stay with his wife and three children).

39. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 152 at 4 (June 14, 1994).

40. *See id.* (indicating the benefit to society by allowing minimum security and low-risk offenders to participate in home detention programs, rather than traditional incarceration).

41. *See id.* (proclaiming the added benefit to society from allowing minimum security and low-risk offenders to participate in home detention programs rather than traditional methods of incarceration, thereby freeing cell space for those criminals who pose greater risk to society); *Politics and Fear Create Crime-Control Industry*, SEATTLE TIMES, Sept. 25, 1994, at B6 (stating that, in the past 16 years, California has spent $5 billion on new prison construction as its inmate population has increased from 19,000 to 120,000); *see also State, U.S. Inmate Population Hits Record; '93 Incarcerations Nearly Triple 1980's Data Shows*, DALLAS MORNING NEWS, June 2, 1994, at 1A (discussing the budgetary problems of prison overcrowding, and stating that California had the most inmates incarcerated in state facilities, 119, 951, followed by Texas with 71,103); Paul W. Valentine, *'You Can't Build Your Way Out,' Maryland Prison Official Says; To Ease Crowding,*

Some have questioned the constitutionality of electronic monitoring devices, specifically, whether they intrude on one's constitutionally guaranteed right to privacy under the Fourth Amendment.[42] The main point of contention concerns whether the surveillance devices constitute a "search" within the Fourth Amendment's unreasonable search and seizure prohibition.[43] In Justice Harlan's concurring opinion in *Katz v. United States*,[44] he sets forth what has become the accepted test to determine which acts comprise an unconstitutional search and seizure.[45] The two questions to be decided are: (1) Has the individual "exhibited an actual subjective expectation of privacy" by his or her conduct; and (2) is the individual's expectation of privacy "one that society is prepared to recognize as reasonable?"[46]

Industry experts agree that electronic home detention does not constitute a search under the Fourth Amendment.[47] The electronic monitoring devices neither eavesdrop on one's conversations, nor do they observe an individual's activity in that person's home. Furthermore, some experts agree that home confinement could withstand a Constitutional challenge for two additional reasons.[48] "First, participation in a monitoring program is usually voluntary, and thus, involves informed consent and a valid waiver of privacy rights. Second, if the participant is a convicted criminal, the right to privacy is already severely diminished."[49] Thus, any actual expectation of privacy, whether reasonable or otherwise, is likewise diminished.[50] Thus, Justice Harlan's *Katz* test probably would not significantly obstruct the technology's application under these circumstances

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*Robinson Urges State to Expand Alternatives*, WASH. POST, May 24, 1993, at B1 (stating that Maryland is looking toward expanding its home detention program as an alternative to its current practice of incarceration).

42. Richard H. McAdams, *Tying Privacy in Knots: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 VA. L. REV. 297, 340-41 (1985); *see id.* (providing an example of an article which criticizes beeper monitoring, and maintains that it is in fact harmful to one's right to privacy); *see also* U.S. CONST. amend. IV (preserving the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, etc.).

43. Electronic Surveillance, Informal Op. Utah Att'y Gen. 83-81, at 2 (Apr. 24, 1985).

44. 389 U.S. 347 (1967).

45. *Katz*, 389 U.S. at 360 (Harlan, J. concurring).

46. *Id.* at 361; *see* United States v. Agapito, 620 F.2d 324, 329 (2d Cir. 1980) (employing the "Katz Test" in denying the appellants' claims that federal agents violated their Fourth Amendment rights when they placed their ears against the appellants' hotel room, in order to overhear the appellants' conservation); Dow Chem. Co. v. United States, 536 F. Supp. 1355, 1364 (1982) (implementing the "Katz Test" in reviewing Dow Chemical's contention that the Environmental Protection Agency should be enjoined from conducting aerial surveillance and photography of Dow's manufacturing facility in Midland, Michigan).

47. Electronic Surveillance, *supra* note 43, at 81.

48. Mark E. Burns, Comment, *Electronic Home Detention: New Sentencing Alternative Demands Uniform Standards*, 18 J. CONTEMP. L. 75, 94 (1992).

49. *Id.*

50. *Id.*

since the program is voluntary, and the criminal's right to privacy already has been diminished.[51]

*Christian A. Ameri*

**Crimes; rape—lack of consent**

Penal Code § 261.7 (new).
SB 1351 (Marks); 1994 STAT. Ch. 907

In prosecutions for specified sexual offenses,[1] existing law defines consent as an act or attitude that signifies the victim's free will.[2] Existing law further provides that a defendant's honest and reasonable belief that a victim consented to sexual intercourse may negate criminal intent and as such, may serve as a defense to rape.[3] Chapter 907 requires that in prosecutions for certain sexual

51. *Id.*; Electronic Surveillance, *supra* note 43, at 2.

1. *See* CAL. PENAL CODE § 261(a) (West Supp. 1994) (defining rape as an act of sexual intercourse with an individual other than the spouse of the actor under specified circumstances demonstrating the victim's lack of consent); *id.* § 286(d) (West Supp. 1994) (listing the elements which comprise the crime of sodomy against another's will); *id.* § 288a(d) (West Supp. 1994) (providing criminal response for one who accomplishes oral copulation against another's will): *id.* § 289(a) (West Supp. 1994) (describing the crime of penetration by a foreign object of someone else's anal or genital openings against his or her will).

2. *Id.* § 261.6 (West Supp. 1994); *see id.* (stating that in order to constitute consent, the victim must be aware of the nature of the accused's act and must indicate consent freely and voluntarily and noting that the victim's past or present dating relationship with the defendant will not be sufficient to constitute consent); *see also* People v. Nash, 261 Cal. App. 2d 216, 223, 67 Cal. Rptr. 621, 625 (1968) (explaining that manifestation of the victim's nonconsent would satisfy the minimal degree of resistance necessary to defend against a rapist), *cert. denied*, 393 U.S. 944 (1968); People v. Lay, 66 Cal. App. 2d 889, 893, 153 P.2d 379, 381 (1944) (asserting that there can be no consent when the victim is threatened with great bodily harm); *cf.* People v. Stengel, 570 N.E.2d 391, 396 (Ill. 1991) (holding that the victim's failure to cry out or resist could not constitute consent in such sexual crimes where the woman is in fear of harm), *appeal denied*, 580 N.E.2d 130 (Ill. 1991); Hernandez v. State, 804 S.W.2d 168, 170 (Tex. App. 1991) (concluding that victims of sexual assault did not have to resist and that the analysis in deciding defendant's guilt should focus on his compulsion, as opposed to the resistance by the victim); State v. Woodfork, 454 N.W.2d 332, 334 (S.D. 1990) (discussing a rape case in which the defendant asserted that the victim's theft of condoms should be admissible as to the issue of consent).

3. People v. Mayberry, 15 Cal. 3d 143, 157, 542 P.2d 1337, 1346, 125 Cal. Rptr. 745, 754 (1975); *see id.* (finding that the defendant only had to raise a reasonable doubt as to his reasonable and good faith belief in the victim's consent); *id.* at 154, 542 P.2d at 1344, 125 Cal. Rptr. at 752 (noting that one who acts under mistake of fact is generally not criminally liable due to a lack of criminal intent); *see also* People v. Williams, 4 Cal. 4th 354, 362, 841 P.2d 961, 966, 14 Cal. Rptr. 2d 441, 446 (1992) (concluding that since the *Mayberry* instruction was based on the defendant's mistake of fact, such an instruction will only be granted if the defendant has demonstrated the victim's equivocal conduct through substantial evidence and noting that instructions as to mistake of fact should not be given in cases where the defendant is relying on actual consent as a defense); People v. May, 213 Cal. App. 3d 118, 127, 261 Cal. Rptr. 502, 507 (1989) (deciding that when the jury concludes that neither party to a rape trial is being truthful, and the defendant is only asserting a defense of actual consent, the court has a *sua sponte* obligation to instruct the jury about the defendant's

offenses, the victim's request or suggestion to the defendant that a condom or other form of birth control be used, in absence of other evidence, will not be sufficient to constitute her consent to his actions.[4]

INTERPRETIVE COMMENT

Chapter 907 was initiated in part as a response to a nationally publicized rape case in Texas in which the defendant claimed his victim consented to intercourse because she requested that he wear a condom.[5] Although the defendant was

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reasonable and good faith belief as to consent), *review denied*, 1989 Cal. LEXIS 4812 (1989); People v. Bruce, 208 Cal. App. 3d 1099, 1104, 256 Cal. Rptr. 647, 649 (1989) (contrasting the defense of consent against the *Mayberry* defense as to mistake of fact, and noting that while the defense of consent allows the jury to choose between the victim's and defendant's version of the incident, the reasonable and good faith belief as to the consent defense permits the jury to accept both the defendant's and victim's versions as true); *cf.* Merced Mut. Ins. Co. v. Mendez, 213 Cal. App. 3d 41, 51, 261 Cal. Rptr. 273, 280 (1989) (determining that an unreasonable belief as to a victim's consent, despite being honest, would still violate the criminal provision against forcible oral copulation); People v. Bolton, 566 N.E.2d 348, 352 (Ill. 1990) (ruling that a victim's choosing to be sexually assaulted by one individual rather than repeated sexual assaults by others does not establish her consent to the sexual crime); People v. Leonhardt, 527 N.E.2d 562, 567 (Ill. 1988) (holding that the mere provocation of a rapist who used force or the threat of force to obtain sexual intercourse would not establish implied consent). *See generally* CALJIC § 10.65 (5th ed. West Supp. 1994) (providing that a reasonable and good faith belief as to voluntary consent is a defense to the charges of forcible rape, oral copulation by force or threat, forcible sodomy, and penetration of the anal or genital opening by a foreign object and stating, however, that if the victim's equivocal conduct is based upon force, violence, duress, or fear of immediate physical harm, the defendant's belief that the victim consented will not be considered reasonable and in good faith); John C. Meyer, Review of Selected 1990 Legislation, *Criminal Procedure; Sex Offenses—Consent*, 22 PAC. L.J. 323, 525-26 (1991) (examining the treatment of consent as applied to sexual relations under California law).

4. CAL. PENAL CODE § 261.7 (enacted by Chapter 907); *see* Interview with Joshua M. Dressler, Professor of Law, McGeorge School of Law, in Sacramento, California (Oct. 4, 1994) (notes on file with *Pacific Law Journal*) (suggesting that the clause "without other evidence of consent" within Chapter 907 invites a judge to instruct a jury in such a manner that may preclude any finding of consent and asserting that Chapter 907 does not speak to the issue of mistake of fact; thus, even though a jury may not construe a victim's request for a condom as an indicator of consent, an acquittal may still be possible based upon the defendant's reasonable and good-faith belief); Interview with Michael M. Vittielo, Professor of Law, McGeorge School of Law, in Sacramento, CA. (Sept. 16, 1994) (notes on file with *Pacific Law Journal*) (noting that in the absence of the clause specifying that additional evidence of consent was necessary for raising the condom issue as to consent, the law might have conflicted with the defendant's constitutional right to raise a defense, but suggesting that per *Mayberry*, a question of reasonable belief as to consent might be raised because of the defendant's inference that the victim consented by her request that he wear a condom); *cf. Mayberry* at 157, 542 P.2d at 1346, 125 Cal. Rptr. at 754 (holding that the defendant could raise a defense of mistake of fact as to his belief that the victim consented to having sexual intercourse with him). *But see* Interview with Joshua M. Dressler, *supra* (noting further that pursuant to Chapter 907, a victim's asking of her attacker to use a condom is not necessarily equivocal conduct; therefore, per the *Williams* decision, a mistake of fact instruction will not necessarily have to be given); *see also Williams*, at 362, 841 P.2d at 966, 14 Cal. Rptr. 2d at 446 (holding that it is incumbent upon the defendant to prove the victim's equivocal conduct through substantial evidence).

5. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 2 (Aug. 17, 1994); *see* Ron Arias, *Threatened With Rape, Elizabeth Wilson Begged Her Attacker to Wear a Condom. He Did—And a Grand Jury at First Let Him Go*, PEOPLE, May 31, 1993, at 87 (detailing both the rape and the surrounding aftermath of an attack where victim Elizabeth Wilson requested that her attacker Joel Valdez wear a condom and explaining that although she asked him to wear a condom, he initially refused before ultimately complying only after she suggested to him that she might have AIDS); *Man Who Was Asked to Use Condom Guilty of Rape*, L.A. TIMES,

ultimately convicted, the case drew attention to the law's inadequacy in addressing a victim's attempt to protect her future health after being raped.[6] Thus, Chapter 907 seeks to ensure that rape victims feel secure in their attempt to protect themselves from sexually transmitted diseases, if not from the actual rape itself, without having the accused misrepresent the communication before the jury.[7]

Opponents of Chapter 907, however, suggest that while no jury would believe such a defense, a victim's plea to the defendant that he wear a condom before raping her is a factual circumstance that the jury is entitled to consider in some situations.[8] Furthermore, by withholding certain facts from the jury as insufficient to establish consent, opponents assert that the jury may ultimately be confused as to what facts are relevant in determining if consent was obtained prior to the act of intercourse.[9]

*Sean P. Lafferty/Decio C. Rangel, Jr.*

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May 14, 1993, at A34 (discussing the Texas case where victim Elizabeth Wilson plead with her rapist, Joel Valdez, to wear a condom due to her fear of contracting AIDS); Judy Mann, *Beyond the Risk of Rape*, WASH. POST, Oct. 16, 1992, at E3 (describing community outrage at the Austin, Texas grand jury's refusal to indict accused rapist Joel Valdez due to his victim providing a condom and noting that the grand jury had failed to indict him despite evidence that demonstrated the victim was held at knife-point and had run naked to a neighbor's house for assistance after the ordeal).

6. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 1 (Aug. 15, 1994); *see id.* (citing the State Bar Conference of Delegates' assertion that prior to the enactment of SB 1351, California law compelled a woman to choose between protecting herself or risk being found by a jury to have consented to rape); *see also* Arias, *supra* note 5 (reporting that after significant public outcry, a subsequent grand jury indicted the accused rapist who was ultimately found guilty and sentenced to 40 years in prison).

7. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 2 (Aug. 17, 1994); *see also* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 1 (Aug. 15, 1994) (explaining that SB 1351 is necessary because a victim's attempt at keeping herself free from further harm from a rapist may be construed as consensual behavior); Mann, *supra* note 5 (warning that rape today involves not only the loss of self-worth and the risk of immediate physical injury to the victim, but also includes the possibility of contracting AIDS). *But see* Interview with Joshua M. Dressler, *supra* note 4 (noting that instances of date-rape will presumably not be affected by Chapter 907 due to the "without other evidence" clause).

8. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 2 (Aug. 17, 1994); *see id.* (citing opposition from the California Attorneys for Criminal Justice); *see also* Interview with Michael M. Vittielo, *supra* note 4 (suggesting concern that the defendant may not be able to present evidence as to mistake of fact without additional evidence of consent).

9. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 2 (Aug. 17, 1994).

**Crimes; rewards—offers by Governor for information leading to arrest**

Penal Code § 1547 (amended).
AB 1551 (Epple); 1994 STAT. Ch. 880

Under existing law, the Governor has the power to offer rewards[1] of up to $50,000 for information leading to the arrest and conviction of anyone who kills,[2] assaults with a deadly weapon,[3] or inflicts serious bodily harm on a police officer,[4] who is acting within the line of duty.[5] Chapter 880 adds to this list of offenses for which a reward may be offered, attempted murder in the first and second degree of a peace officer.[6] Chapter 880 further adds that a reward may be offered if any of these offenses are directed towards a firefighter.[7]

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1. *See* Ingram v. Colgan, 106 Cal. 113, 124, 39 P. 437, 438 (1895) (defining the difference between a bounty and a reward; a reward is the offering of a sum of money paid to persons who perform a specific act, while a bounty applies to where action on the part of many persons is desired and the money is paid to anyone who acts on the offer).

2. *See* CAL. PENAL CODE § 187 (West 1988) (defining murder as the unlawful killing of a human being or fetus with malice aforethought); *id.* § 188 (West 1988) (defining malice as acting with anti-social motive and wanton disregard for human life).

3. *See id.* § 245 (West Supp. 1994) (defining assault with a deadly weapon as using force with an instrumentality that is likely to cause great bodily injury); *see also id.* § 240 (West 1988) (defining assault as an unlawful attempt with a present ability to commit violent injury on another person); People v. Young, 120 Cal. App. 3d 683, 690, 175 Cal. Rptr. 1, 3 (1981) (holding that the court need not instruct the jury on assault with a deadly weapon or assault with intent to commit murder unless the greater crime of attempted murder cannot be committed without committing the lesser crime).

4. *See* BLACK'S LAW DICTIONARY 1156 (6th ed. 1990) (defining police officer as a person employed to enforce municipal laws and ordinances to preserve peace and order); *cf.* City of New Orleans v. Lewis, 269 So. 2d 450, 453-54 (La. 1972) (explaining the significance of the status of a police officer); Miers v. State, 29 S.W. 1074, 1076 (Tex. Crim. App. 1895) (providing that whether a person is an officer depends on whether the person has a right to arrest).

5. CAL. PENAL CODE § 1547(a)(4) (amended by Chapter 880); *see* Brite v. Board of Supervisors, 21 Cal. App. 2d 233, 237, 68 P.2d 1007, 1010 (1937) (providing that the Legislature may empower the Governor to offer rewards); Griffin v. Los Angeles, 134 Cal. App. 763, 773-74, 26 P.2d 655, 660 (1933) (stating that because crimes are against the people of the state, the power to offer rewards rests solely in the state government unless there is an interest that is particularly local, in which case the Legislature may create proper authority). *But see* City of Los Angeles v. Gurdane, 59 F.2d 161, 162 (9th Cir. 1932) (providing that the power to offer rewards for apprehension is not within the power of public officers); *Brite*, 21 Cal. App. 2d at 236, 68 P.2d at 1009 (excluding the authority of county officers to offer a reward for an offense against the people of the state).

6. CAL. PENAL CODE § 1547(a)(4) (amended by Chapter 880); *see id.* § 830 (West Supp. 1994) (defining peace officer); *see also id.* § 21a (West 1988) (providing that the elements for attempt to commit a crime are a specific intent and a direct but ineffectual act done towards its commission); *id.* § 189 (West Supp. 1994) (defining the difference between first and second degree murder); *id.* § 217.1 (West 1988) (providing that the sentence for attempted murder on certain public officials is 15 years to life imprisonment); *id.* § 664 (West 1988) (providing that the punishment for an attempt to commit murder is half the time stated for the crime itself); People v. Parrish, 87 Cal. App. 2d 853, 856, 197 P.2d 804, 806 (1948) (stating that the essential elements of attempted murder are specific intent to commit the crime and a direct but ineffectual act in furtherance of the crime which is more than mere preparation); *cf.* 18 U.S.C.A. § 1114 (West Supp. 1994) (providing that the sentence for attempting to kill a police officer or United States employee will be no more than 20 years).

7. CAL. PENAL CODE § 1547(a)(4) (amended by Chapter 880); *see id.* § 245.1 (West 1988) (defining firefighter as a full time, part time, or volunteer officer, employee or member of a fire department).

Under existing law, the Governor has the power to offer a reward for information leading to the arrest and conviction of anyone who is involved in the burning[8] or bombing of public property.[9] Chapter 880 provides that a reward also may be offered for information regarding the burning or bombing of private property.[10]

## INTERPRETIVE COMMENT

Chapter 880 was enacted to address the need to protect peace officers and firefighters by providing an incentive to those with information about a crime to reveal the information.[11] Violence against police officers and firefighters is at a dangerously high level because of bitter attitudes directed towards them.[12] This concern, however, comes at a time when the number of police officers killed in the line of duty is thirty percent lower than a decade ago.[13]

*Decio C. Rangel, Jr.*

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8. *See id.* § 451 (West Supp. 1994) (providing that burning is punishable as arson when a person willfully and maliciously sets fire, causes or aids a fire, or counsels or procures the burning of property); *see also* People v. Bowman, 240 Cal. App. 2d 358, 387, 49 Cal. Rptr. 772, 791 (1966); People v. Andrews, 234 Cal. App. 2d 69, 74-75, 44 Cal. Rptr. 94, 98 (1965) (explaining malice, in relation as related to arson, as the deliberate and intentional firing, and not an unintentional or accidental ignition).

9. CAL. PENAL CODE § 1547(a)(5) (amended by Chapter 880); *see* CAL. GOV'T CODE § 830 (West 1980) (defining public property as real or personal property owned or controlled by the public entity with certain exclusions).

10. CAL. PENAL CODE § 1547(a)(5) (amended by Chapter 880).

11. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1551, at 2 (Mar. 1, 1994); *see* Scott Harris, *Firefighters Recall Night of Bullets, Blood, Terror; Violence: 'Scott's Been Hit!' Crackled the Radio in the Saddest Chapter in a Marathon of Irony and Courage*, L.A. TIMES, May 9, 1992, at A1 (providing an account of the attempted murder of firefighter Scott Miller by assailant, Thurman Ivory Woods).

12. *See* Robert Davis, *'Attitude Change' Proves Lethal for Police*, USA TODAY, Jan. 3, 1994, at 3A (stating that police officers are assaulted on an average of 90,000 times a year primarily because of a break down in respect).

13. Lou Carlozo, *Officers Approach a Rare 3-year Mark for Survival*, CHI. TRIB., Dec. 29, 1993, at N1; *see id.* (recounting an attack on a Chicago Police Officer); *see also* Davis, *supra* note 12, at 3A (stating that although 140 officers were killed in the line of duty in 1993, this figure is down from 13 years earlier when 161 police officer deaths were reported).

**Crimes; robbery—automated teller machines**

Penal Code § 212.5 (amended).
SB 2098 (Hayden); 1994 STAT. Ch. 919

Existing law defines robbery as the felonious taking[1] of the personal property in possession of another, from his or her person or immediate presence[2] against his or her will accomplished by means of force or fear.[3]

Existing law defines first degree robbery[4] as the robbery of a person in an inhabited dwelling, building, vessel, or floating home or the robbery of an operator or passenger in a bus, trolley, taxi, or other specified vehicle used for transportation or hire.[5] In addition, existing law provides that all kinds of robbery, other than those listed above, are of the second degree.[6]

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1. *See* People v. Brito, 232 Cal. App. 3d 316, 325, 283 Cal. Rptr. 441, 446 (1991) (identifying the two elements of taking as gaining possession of the victim's property and asporting or carrying away the loot), *review denied*, 1991 Cal. LEXIS 4790 (1991); *see also* BLACK'S LAW DICTIONARY 114 (6th ed. 1990) (defining asportation as the removal of things from one place to another). The carrying away of the victim's property is larceny and the distance an object is moved need not be substantial to constitute the crime. *Id.*

2. *See* People v. Dominguez, 11 Cal. App. 4th 1342, 1347-48, 15 Cal. Rptr. 2d 46, 48 (1992) (determining that property is in the immediate presence of a person when it is within his reach, inspection, observation, or control, and that he could, if not overcome by violence or prevented by fear, retain his possession of it).

3. CAL. PENAL CODE § 211 (West 1988); *see id.* § 212 (West 1988) (including within the definition of fear the following: (1) The fear of an unlawful injury to the person or property of the person robbed, or of any relative or member of his family; or, (2) the fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery); *see also id.* § 667 (West Supp. 1994) (allowing an increase in sentencing for a previous conviction of a serious felony); *id.* § 1192.7(c)(1)(19) (West Supp. 1994) (including in the definition of serious felony the crime of robbery or bank robbery); People v. Butler, 65 Cal. 2d 569, 573, 421 P.2d 703, 706, 55 Cal. Rptr. 511, 514 (1967) (stating that a specific intent to steal is a necessary element of robbery and that intent to steal may be inferred when one takes the property of another, but the existence of a state of mind incompatible with an intent to steal precludes a finding of theft or robbery); *Brito*, 232 Cal. App. 3d at 325, 283 Cal. Rptr. at 446 (stating that the necessary element of force or fear in a robbery exists if force or fear causes the victim to part with his property and the victim perceives any overt act connected with the commission of the offense).

4. *See* CAL. PENAL CODE § 213(a)(1) (West 1988) (mandating that robbery of the first degree be punished by imprisonment in the state prison for three, four, or six years).

5. *Id.* § 212.5(a) (amended by Chapter 919).

6. *Id.* § 212.5(c) (amended by Chapter 919); *see id.* § 213 (West 1988) (providing that robbery of the second degree is punishable by imprisonment in the state prison for two, three, or five years).

Chapter 919 provides that every robbery of a person using an automated teller machine (ATM) or robbery of someone who has just finished using an ATM machine and is still in the vicinity is robbery of the first degree.[7]

INTERPRETIVE COMMENT

Under existing law, criminals who commit a robbery in the vestibule or inside of a bank face first degree robbery charges.[8] Under prior law, those who commit robbery outside the front door of a bank or in the bank's parking lot would only face second degree robbery charges.[9] Robbers know the difference and commit the robbery in the parking lot or outside the bank to avoid the possible first degree robbery charge.[10]

Chapter 919, by extending first degree robbery to include robbery of persons using ATM's, will help protect ATM users while in the vicinity of the machine.[11]

*Kenneth J. Pogue*

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7. *Id.* § 212.5(b) (amended by Chapter 919).

8. *Id.* § 212.5(a) (amended by Chapter 919); *see* People v. Cooper, 53 Cal. 3d 1158, 1164, 811 P.2d 742, 747, 282 Cal. Rptr. 450, 455 (1991) (stating that in determining aider and abettor liability, the commission of a robbery continues until all acts that are contained in the offense cease); People v. Stevens, 141 Cal. 488, 490, 75 P. 62, 63 (1903) (stating that the value of a stolen article is immaterial as a robbery is robbery irrespective of the value of the property taken).

9. 1989 Cal. Stat. Ch. 361, sec. 1, at 1486 (amending CAL. PENAL CODE § 212.5).

10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2098, at 2 (July 5, 1994).

11. CAL. PENAL CODE § 212.5(b) (amended by Chapter 919); *see* Mark Arend, *Drugs and Gangs Fuel Robbery Flames*, ABA BANKING, Apr. 1994, at 40 (recognizing that in New York, ATM crimes occurred an average of 348 times during the 1990-91 period and that in 1992 there were 277 ATM crimes). The number of ATM crimes accounted for less than 1% of all violent crimes in New York. *Id.* Barry F. Schreiber, *The Future of ATM Security; Automated Teller Machines; Financial Services: Banking on Security*, SEC. MGMT., Mar. 1994, at 18A (stating that some surveys indicate that the rate of attacks on ATM customers in some locations might be as high as one in every one million transactions and that up to 4000 robberies can be expected for ATM customers each year in the United States).

**Crimes; sentence enhancement—attempted murder of police officers and firefighters**

Penal Code § 664 (amended).
AB 2433 (Epple); 1994 STAT. Ch. 793

Under prior law, attempted murder[1] of a peace officer[2] or firefighter[3] in the first degree received a punishment of life imprisonment with the possibility of parole.[4] However, murder in the second degree, was punishable by a prison term of five, seven, or nine years.[5]

Chapter 793 provides that attempted murder,[6] in either the first or second degree, of a peace officer or firefighter by someone who reasonably knows of the person's status as a peace officer or firefighter, is punishable by life in prison with the possibility of parole.[7] Chapter 793 further states that its provisions specifically apply to a person who commits a direct, but ineffectual act, toward the killing of another human being while harboring express malice aforethought.[8]

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1. *See* CAL. PENAL CODE § 187 (West 1988) (defining murder as the unlawful killing of a human being, or fetus with malice aforethought); *id.* § 188 (West 1988) (defining malice as acting with anti-social motive and wanton disregard for human life); *id.* § 189 (West Supp. 1994) (defining first and second degree murder); *see also id.* § 21(a) (West 1988) (providing that attempt consists of a specific intent to commit the crime and a direct but ineffectual act in furtherance of the crime); *cf.* People v. Phillips, 64 Cal. 2d 574, 587, 414 P.2d 353, 363, 51 Cal. Rptr. 225, 235 (1966) (providing that murder is a deliberate action performed with knowledge that the conduct endangers the life of another and is done with conscious disregard for life); People v. Parrish, 87 Cal. App. 2d 853, 857, 197 P.2d 804, 806 (1948) (asserting that the act of attempt must be more than mere preparation).

2. *See* CAL. PENAL CODE § 830 (West Supp. 1994) (defining peace officer); *cf.* Miers v. State, 29 S.W. 1074, 1076 (Tex. Crim. App. 1895) (providing that whether a person is an officer depends on whether that person has a right to make an arrest); Creighton v. Commonwealth, 83 Ky. 142, 144 (1885) (providing that determining whether a person is a peace officer under the law is for the judge and not the jury).

3. *See* CAL. PENAL CODE § 245.1 (West 1988) (defining fireman, firefighter, and emergency rescue personnel); *see also* CAL. GOV'T CODE § 20017.9 (West 1980) (setting forth state safety member and firefighting duties).

4. 1986 Cal. Stat. ch. 519, sec. 2, at 1859 (amending CAL. PENAL CODE § 664). *Compare id. with* CAL. PENAL CODE § 190.2(a)(7), (9) (West Supp. 1994) (specifying that the killing of a peace officer is punishable by death or life in prison without the possibility of parole) *and id.* § 217.1(b) (West 1988) (providing that a person who attempts the murder of a public official, as defined in California Penal Code § 217.1(a), will be confined in the state prison for a term of 15 years to life).

5. 1986 Cal. Stat. ch. 519, sec. 2, at 1859 (amending CAL. PENAL CODE § 664).

6. *See* CAL. PENAL CODE § 664 (amended by Chapter 793) (clarifying that attempted murder includes either attempted willful, deliberate, and premeditated murder).

7. *Id.*; *see id.* § 21a (West 1988) (stating that the elements for an attempt to commit a crime include both a specific intent to commit the crime and a direct, but ineffectual, act towards the commission of the crime); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2433, at 3 (June 28, 1994) (maintaining that there is no case law clarifying the elements of attempted second degree murder because the law does not recognize the existence of such a crime); *cf.* 18 U.S.C.A. § 1114 (West Supp. 1994) (providing that the maximum sentence for anyone who attempts to kill an officer or employee of the United States is 20 years in prison).

8. CAL. PENAL CODE § 664(e)(2) (amended by Chapter 793); *see id.* (defining malice aforethought as the specific intent to unlawfully kill another human being); *see also id.* § 7 (West 1988) (stating that malice is a desire to vex, annoy, or injure another person or intent to perform a wrongful act).

INTERPRETIVE COMMENT

The California Legislature has determined that attacks on peace officers and firefighters are too serious of a crime to treat like an attack on any other person.[9] The number of attacks has increased and is currently at a four year high, which would presumably indicate that the danger to these public servants has also increased in recent years.[10] However, long term statistics show that the number of murdered police officers is down from previous years.[11]

The American Civil Liberties Union (A.C.L.U.) has stated its opposition to Chapter 793, arguing that it provides a disproportionate penalty increase for non-premeditated and non-willful attempt.[12] The California Attorneys for Criminal Justice also opposes Chapter 793 because attempted second degree murder of a police officer would approximate the penalty of actual second degree murder of a non-police officer.[13] Furthermore, the A.C.L.U. reportedly opposes Chapter 793 because of the possibility of a life sentence resulting from an altercation that did not result in injury.[14]

*Decio C. Rangel, Jr.*

**Crimes; sentence enhancement—controlled substance offenses**

Penal Code § 1170.82 (new).
AB 42 (Peace); 1994 STAT. Ch. 352

Existing law provides that when a judgment of imprisonment is warranted and the statute specifies three possible terms, the court must order the imposition

9. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2433, at 2 (Mar. 15, 1994).

10. *Id.*; *see* Robert Davis, *'Attitude Change' Proves Lethal for Police*, USA TODAY, Jan. 3, 1994, at 3A (stating that the number of attacks on police officers, averaging 90,000 a year, is primarily because of a breakdown in respect); Scott Harris, *Firefighters Recall Night of Bullets, Blood, Terror; Violence: 'Scott's Been Hit!' Crackled the Radio, in the Saddest Chapter in a Marathon of Irony and Courage*, L.A. TIMES, May 9, 1992, at A1 (describing an account of the attempted murder of firefighter Scott Miller by Thurman Ivory Woods during the 1992 Los Angeles riots).

11. Lou Carlozo, *Officers Approach a Rare 3-Year Mark for Survival*, CHI. TRIB., Dec. 29, 1993, at N1; *see id.* (noting that the number of officers killed while on duty has declined by almost 30%); Davis, *supra* note 10 (reporting that the number of officers killed in the line of duty in 1993 was down from 13 years earlier, in which 161 officers were reported killed in the line of duty).

12. Davis, *supra* note 10; *see id.* (providing that the A.C.L.U. opposes Chapter 793, claiming that the penalty increase is excessive).

13. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2433, at 3 (June 28, 1994).

14. *Id.*

of the middle term, unless there are circumstances in aggravation[1] or mitigation[2] of the crime.[3] Chapter 352 provides that when a person is convicted of specified

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1. *See* CAL. CT. R. 421(a) (stating that facts relating to the crime, whether charged or chargeable as enhancements, are circumstances in aggravation, including the following facts: (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; (2) the defendant was armed with or used a weapon at the time of the commission of the crime; (3) the victim was particularly vulnerable; (4) the defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission; (5) the defendant induced a minor to commit or assist in the commission of the crime; (6) the defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process; (7) the defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed; (8) the manner in which the crime was carried out indicates planning, sophistication, or professionalism; (9) the crime involved an attempted or actual taking or damage of great monetary value; (10) the crime involved a large quantity of contraband; or (11) the defendant took advantage of a position of trust or confidence to commit the offense); *id.* 421(b) (adding that facts relating to the defendant may be circumstances in aggravation, including the following: (1) The defendant has engaged in violent conduct indicating a serious danger to society; (2) the defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness; (3) the defendant has served a prior prison term; (4) the defendant was on probation or parole when the crime was committed; or (5) the defendant's prior performance on probation or parole was unsatisfactory); *id.* 421(c) (noting that any other statutorily declared facts may be circumstances in aggravation); *see also* People v. Moreno, 128 Cal. App. 3d 103, 110, 179 Cal. Rptr. 879, 883 (1982) (holding that the essence of aggravation pertains to the bearing of a particular fact in making the offense worse than the ordinary offense). *See generally* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1461 (2d ed. 1989 & Supp. 1994) (discussing aggravation of a sentence in a criminal context).

2. *See* CAL. CT. R. 423(a) (declaring that facts relating to the crime may be circumstances in mitigation, including the following facts: (1) The defendant was a passive participant or played a minor role in the crime; (2) the victim was an initiator of, willing participant in, or aggressor or provoker of the incident; (3) the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur; (4) the defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense; (5) the defendant, with no apparent predisposition to do so, was induced by others to participate in the crime; (6) the defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim; (7) the defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal; (8) the defendant was motivated by a desire to provide necessities for his or her family or self; or (9) the defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime, and the victim of the crime who inflicted the abuse was the defendant's spouse, intimate cohabitant, or parent of the defendant's child, and the facts concerning the abuse do not amount to a defense); *id.* 423(b) (adding that facts relating to the defendant may be circumstances in mitigation, including the following facts: (1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes; (2) the defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime; (3) the defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process; (4) the defendant is ineligible for probation and but for that ineligibility would have been granted probation; (5) the defendant made restitution to the victim; or (6) the defendant's prior performance on probation or parole was satisfactory).

3. CAL. PENAL CODE § 1170(b) (West Supp. 1994); *see id.* (stating that at least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or in the probation officer's report, or to present additional facts); *id.* (mandating that the court set forth on the record the facts and reasons for imposing the upper or lower term); *see also id.* § 1170(a)(1) (West Supp. 1994) (proclaiming that the purpose of imprisonment is punishment, and this purpose is best served by terms proportionate to the seriousness of the offense with the provision for uniformity in the sentences of offenders committing the same offense under similar circumstances); CAL. CT. R. 420(b) (stating that circumstances in aggravation and mitigation must be established by a preponderance of the evidence, and selection of the upper term is justified

controlled substance offenses and that person knew[4] or reasonably should have known, that the person to whom he or she was selling, furnishing, administering, or giving away the controlled substance was pregnant, had been previously convicted of a violent felony,[5] or was in psychological treatment for a mental disorder or for substance abuse, these facts would be considered circumstances in aggravation of the crime when a court imposes a term of imprisonment under these provisions.[6]

INTERPRETIVE COMMENT

Under the provisions of Chapter 352, there will be at least one factor in aggravation of an offense every time a defendant is convicted of knowingly selling drugs to a member of one of the specified groups, thereby making it easier for the prosecution to obtain the highest of the three possible sentences for the crime.[7] However, Chapter 352 is opposed by the American College of Obstetricians and Gynecologists because it creates a condescending standard for

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only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation).

4. *See* CAL. PENAL CODE § 7 (West 1988) (providing that the word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provision of this code, but does not require any knowledge of the unlawfulness of such fact or omission); People v. Calban, 65 Cal. App. 3d 578, 584, 135 Cal. Rptr. 441, 444 (1976) (stating that the word "knowing" as used in a criminal statute imports only an awareness of the facts which constitute a violation of the statute).

5. *See* CAL. PENAL CODE § 667.5(c) (West Supp. 1994) (defining violent felony as any of the following: (1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd acts on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved, or any felony in which the defendant uses a firearm which use has been charged and proved; (9) any robbery perpetrated in an inhabited dwelling house or vessel, as defined in California Harbors and Navigation Code § 21, which is inhabited and designed for habitation, an inhabited floating home, an inhabited trailer coach, or in the inhabited portion of any other building, wherein it is charged and proved that the defendant personally used a deadly or dangerous weapon in the commission of that robbery; (10) arson; (11) penetration of genital or anal openings by foreign object where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (12) attempted murder; (13) explosion, or the attempt to explode or ignite a destructive device or explosive with intent to murder; (14) kidnapping; (15) kidnapping a victim under fourteen years of age; (16) continuous sexual abuse of a child; or (17) carjacking, if it is charged and proved that the defendant personally used a dangerous or deadly weapon in the commission of the carjacking); *id.* (declaring that the aforementioned crimes merit special consideration when imposing a sentence, to display society's condemnation for these extraordinary crimes of violence against the person).

6. *Id.* § 1170.82(a)-(c) (enacted by Chapter 352); *see* CAL. HEALTH & SAFETY CODE §§ 11352, 11360, 11379, 11379.5 (West 1991 & Supp. 1994) (designating the sentences for offenses involving various controlled substances); *cf.* ALASKA STAT. § 12.55.155(a)(5) (West Supp. 1993) (stating that an aggravating condition occurs when the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance).

7. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 42, at 2 (July 5, 1994).

women based on a woman's pregnant condition.[8] Opponents also believe that it is inappropriate to use a medical condition as a basis for increased sentencing.[9]

The Planned Parenthood Affiliates of California oppose this bill because it does not differentiate the stage of pregnancy at which the statute will take effect.[10] Planned Parenthood also believes that Chapter 352 will not reduce drug use by pregnant women and that easier access to drug rehabilitation programs for pregnant women would be more productive.[11]

California Advocates for Pregnant Women, a statewide coalition that advocates for the needs of pregnant women and chemically dependent mothers, is opposed to Chapter 352 for two reasons: (1) The imposition of aggravating facts based on a woman's pregnancy singles out women as victims needing special protection by virtue of their status, and this sends out the wrong message while demeaning women in general; and (2) limited resources are wasted on

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8. *Id.* at 3; *see id.* (advocating the view that AB 42 suggests that the factor of pregnancy requires unique consideration and raises the issue of the fetus as a factor in developing laws).

9. *Id.* at 3 (July 5, 1994); *see id.* (reporting opponent's arguments that AB 42 suggests that pregnant women are unable to make a decision or be responsible for actions and adding that if the logic of AB 42 is to be carried to its ultimate extreme, there are innumerable medical conditions which could be identified as impacting judgment); *see also id.* (recognizing the opposition of the California Women Lawyers, who feel that the special consideration being afforded to pregnant women under AB 42 assumes that pregnant women are unable to act responsibly during pregnancy, and that they are legally disqualified from exerting free will); *id.* (opining that all persons who accept and use illegal drugs should be treated equally, and persons who furnish such illegal substances should be punished equally, regardless of the character of the recipient of those drugs).

10. *Id.* at 4.

11. *Id.*; *see* 21 U.S.C.A. § 861(f) (West 1993) (mandating that it is unlawful for any person to knowingly or intentionally provide or distribute any controlled substance to a pregnant woman, and any person who violates this provision will be subjected to twice the maximum penalty); *see also* Johnson v. State, 578 So. 2d 419, 423-27 (Fla. 1991) (determining whether the ingestion of a controlled substance by a pregnant female constituted delivery to a minor under a Florida statute and concluding that it does not); Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 BROOK. L. REV. 1213, 1215-16 (1991) (discussing parental misuse of alcohol, a legal and "respectable" drug, and parental misuse of "crack" cocaine, a more sinister drug); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1419 (1991) (arguing that punishing drug-addicted black women for having babies violates the equal protection clause because it stems from, and perpetuates, subordination of that race); Margaret P. Spencer, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 393, 393 (1993) (estimating that as many as 15% of all pregnant women ingest illegal drugs during their pregnancies); *id.* at 394 (noting that many states have viewed prenatal drug use as just another part of the nation's growing "drug crisis" with an approach consisting of aggressive enforcement of existing criminal statutes and proposals for new legislation); Deborah A. Bailey, Comment, *Maternal Substance Abuse: Does Ohio Have an Answer?*, 17 DAYTON L. REV. 1019, 1020 (1992) (advocating the education of women regarding the dangers of drug use on the fetus and encouraging drug avoidance); Louise M. Chan, Note, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 199 (1993) (citing a study by the National Institute on Drug Abuse (NIDA) which estimates that 739,200 infants are born drug-exposed each year, at an annual cost of over $13 billion, and the numbers continue to rise); Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1401-1410 (1990) (describing the effects of a pregnant woman's cocaine use on the fetus and evaluating the constitutionality of criminal prosecutions under existing child protection and drug laws); *cf.* N.J. STAT. ANN. § 2C:35-8 (West Supp. 1994) (providing that any person who distributes a controlled substance to a pregnant female is subject to twice the term of imprisonment, fine, and penalty). *See generally* Julia E. Jones, Comment, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1180 (1992) (proposing that criminalizing the sale or distribution of drugs to pregnant females would be a means of curbing prenatal drug abuse).

longer prison terms for individuals who sell drugs to pregnant women and would be better spent on research and treatment for drug addicts.[12] Thus, it appears that one of the groups that Chapter 352 intends to protect does not welcome this form of protection.[13]

*Joseph A. Tommasino*

**Crimes; sentence enhancement—criminal street gangs**

Penal Code § 186.22 (amended).
SB 480 (McCorquodale); 1994 STAT. Ch. 47
*(Effective April 19, 1994)*

Existing law defines a criminal street gang as an organization of three or more persons who engage in one or more of the criminal activities enumerated in California Penal Code section 186.22 and whose members have a common name, identifying sign or symbol.[1] Prior law required that active criminal street gang members, who have knowledge that members of their gang engage in or have engaged in a pattern of criminal gang activity,[2] and who willfully promote,

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12. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 42, at 4 (July 5, 1994).
13. *Id.*

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1. CAL. PENAL CODE § 186.22(f) (amended by Chapter 47); *see* People v. Green, 227 Cal. App. 3d 692, 699, 278 Cal. Rptr. 140, 145-46 (1991) (defining member as a person having a relationship to an organization that is not accidental, and holding that the term is not overly vague; thus, does not violate the Due Process Clause of the U.S. Constitution); People v. Gamez, 235 Cal. App. 3d 957, 972, 286 Cal. Rptr. 894, 902 (1991) (holding that a defendant must have a relationship with a criminal street gang that is more than nominal and must devote all or a substantial part of his time and efforts to the gang in order to be deemed an active member); *In re* Jose, 230 Cal. App. 3d 1455, 1462, 282 Cal. Rptr. 75, 79 (1991) (holding that there must be substantial evidence to support a finding of a pattern of criminal gang activity and that conclusional testimony by other gang members is not sufficient); *In re* Nathaniel, 228 Cal. App. 3d 990, 1001, 279 Cal. Rptr. 236, 243 (1991) (holding that the statute's requirement of an ongoing organization of three or more persons was met when juvenile witnesses identified three participants in a crime as members of a gang, and where the gang's membership list was written on a wall); *id.* at 1001, 279 Cal. Rptr. at 243 (holding that the requirement of a common name and identifying sign or symbol was met by evidence that the members of a gang were known by more than one name and by graffiti which signaled gang membership, although there was no special color or clothing associated with membership); *id.* at 1004-05, 279 Cal. Rptr. at 246 (holding that a police officer's expert testimony might be sufficient to establish that a gang's primary activity is one of the listed offenses in the statute); *cf.* Lanzetta v. New Jersey, 306 U.S. 451, 456-58 (1939) (holding that the phrase "known to be a member" of a gang was overly vague and thereby violated the Due Process Clause of the U.S. Constitution); *In re* Leland, 223 Cal. App. 3d 251, 259-60, 272 Cal. Rptr. 709, 714 (1990) (holding that expert testimony by a police officer based on hearsay and arrest information does not constitute substantial evidence of a pattern of criminal activity).

2. *See* CAL. PENAL CODE § 186.22(e) (amended by Chapter 47) (defining pattern of criminal activities as the commission, attempted commission, or solicitation of two or more of the enumerated offenses, as long as the last of those offenses occurred within three years after a prior offense, and the offenses were committed

further, or assist in any felonious criminal conduct by members of such gang, be punished by a prison sentence in county jail not to exceed one year, or sentenced to state prison for one, two, or three years.[3] Additionally, prior law included both felonies and misdemeanors when implementing sentence enhancements for crimes committed by a person for the benefit of a criminal street gang.[4]

Chapter 47 increases the minimum state prison term from one year to sixteen months.[5] Additionally, Chapter 47 provides that if a court grants probation or suspends the execution of a sentence imposed by the court, the court will require that the defendant serve a minimum of 180 days in the county jail as a condition of such probation or suspension.[6]

Existing law enumerates certain crimes as constituting a pattern of criminal gang activity under California Penal Code section 186.22, including assault with a deadly weapon, robbery, and homicide.[7]

Chapter 47 adds the following crimes to those already enumerated: carjacking,[8] burglary,[9] rape,[10] looting,[11] money laundering,[12] kidnapping,[13] mayhem,[14] aggravated mayhem,[15] torture,[16] grand theft when the value of the

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on separate occasions, or by two or more persons).

3. 1993 Cal. Legis. Serv. ch. 611, sec. 3, at 2838 (amending CAL. PENAL CODE § 186.22); *see* CAL. PENAL CODE § 186.20 (West Supp. 1994) (designating Chapter 11 of the California Penal Code as the California Street Terrorism Enforcement and Prevention Act); *see also Gamez*, 235 Cal. App. 3d at 971, 286 Cal. Rptr. at 901-02 (1991) (holding that California Penal Code § 186.22(a) does not violate a defendant's freedom of association because there is no right to associate for criminal purposes); *cf.* GA. CODE ANN. § 16-15-4(a) (1992) (mandating that any active gang member who assists in any criminal activity of the gang will be guilty of a misdemeanor); ILL. CONS. STAT. ch. 730, para. 5/5-5-3.2(a)(15) (West Supp. 1994) (describing how gang activity will be a factor taken into account for sentence aggravation); MO. REV. STAT. § 578.425 (Vernon Supp. 1994) (providing that any person who assists in the criminal conduct of gang members will receive sentence enhancement).

4. 1993 Cal. Leg. Serv. ch. 611, sec. 3, at 2838 (amending CAL. PENAL CODE § 186.22).

5. CAL. PENAL CODE § 186.22(a) (amended by Chapter 47).

6. *Id.* § 186.22(c) (amended by Chapter 47).

7. *Id.* § 186.22 (amended by Chapter 47); *see id.* (setting forth the specified crimes as homicide, manslaughter, robbery, and assault with a deadly weapon); *id.* § 187 (West 1988) (defining homicide); *id.* § 192 (West 1988) (defining manslaughter); *id.* § 211 (West 1988) (defining robbery); id. § 245 (West Supp. 1994) (defining assault with a deadly weapon); *see also* CAL. HEALTH & SAFETY CODE §§ 11350-11352 (West 1991 & Supp. 1994) (defining the possession, possession for sale, and transportation of controlled substances); CAL PENAL CODE § 136.1 (West Supp. 1994) (defining intimidation of witnesses and victims); *id.* § 246 (West Supp. 1994) (defining shooting at an inhabited dwelling house or occupied vehicle); *id.* § 451 (West Supp. 1994) (defining arson); *id.* § 487 (West Supp. 1994) (defining grand theft of any vehicle, trailer, or vessel).

8. *See* CAL. PENAL CODE § 215 (West Supp. 1994) (defining carjacking).

9. *See id.* § 460 (West Supp. 1994) (defining burglary).

10. *See id.* § 261 (West Supp. 1994) (defining rape).

11. *See id.* § 463 (West Supp. 1994) (defining looting).

12. *See id.* § 186.10 (West Supp. 1994) (defining money laundering).

13. *See id.* § 207 (West Supp. 1994) (defining kidnapping).

14. *See id.* § 203 (West Supp. 1994) (defining mayhem as the act of unlawfully and maliciously depriving a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye or slits the nose, ear, or lip of another).

15. *See id.* § 205 (West 1988) (defining aggravated mayhem).

16. *See id.* § 206 (West Supp. 1994) (defining torture).

money, labor, or real or personal property exceed $10,000,[17] specified felony extortion,[18] felony vandalism,[19] and discharging or permitting the discharge of a firearm from a motor vehicle.[20]

INTERPRETIVE COMMENT

Chapter 47 was enacted because of the public's growing perception that gang activity is rampant in California.[21] The purpose of Chapter 47 is to deter youths from pursuing gang membership by imposing strong penalties for participation in gang activities.[22] Opponents, however, state that the stiffer penalties will have no deterrent effect and will only increase overcrowding in state prisons and county jails.[23]

*Kevin T. Collins*

**Crimes; sentence enhancement—hate crimes**

Civil Code § 51.7 (amended); Penal Code §§ 422.6, 422.7, 422.75, 1170.75 (amended).
SB 1595 (Marks); 1994 STAT. Ch. 407

Existing law provides that a person[1] who commits a felony,[2] or attempts[3] to commit a felony against a victim because of the victim's race, color, religion,

17. *See id.* § 487 (West Supp. 1994) (defining grand theft).
18. *See id.* § 518 (West 1988) (defining extortion).
19. *See id.* § 594 (West Supp. 1994) (defining vandalism).
20. *Id.* § 186.22 (e) (amended by Chapter 47); *see id.* § 12034(c) (West 1992) (providing that the discharge of a firearm from a vehicle is a felony punishable by imprisonment for three, five, or seven years).
21. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 724, at 3 (May 18, 1993) (stating that in 1988, there were approximately 600 active gangs in California, but by 1992 that number had grown to 1800 with over 175,000 members); *see id.* (stating that in 1990-91 in San Bernardino County, 30% of all crimes were committed by gang members); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 724, at 3 (June 18, 1993) (stating that in Los Angeles, direct medical costs from gang activity was over $241 million, while indirect costs might reach $540 million).
22. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 724, at 3 (June 18, 1993).
23. *Id.*; *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 724, at 6 (May 18, 1993) (stating that it costs approximately $22,000 per year to house an inmate, and that prolonged incarceration has no rehabilitative effect).

1. *See* CAL. PENAL CODE § 7 (West 1988) (defining person).
2. *See id.* § 17(a) (West 1988 & Supp. 1994) (defining felony).
3. *See id.* § 21(a) (West 1988) (defining attempt as consisting of two elements: (1) specific intent to commit the crime; and (2) a direct, but ineffectual act performed toward its commission).

nationality, country of origin, ancestry, disability, or sexual orientation[4] will receive an additional term of one, two, or three years in the state prison.[5]

Existing law also provides that people in California have the right to be free of any violence or intimidation committed against them or their property because of their race, color, religion, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute.[6]

Further, existing law provides that no person, whether or not acting under the color of law, or by force or threat of force, may willfully injure, threaten, intimidate, interfere with, or oppress any other person in the enjoyment of any right or privilege secured by the United States and California Constitutions and national and state laws because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation.[7]

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4. *See* CAL. CIV. CODE § 51.7(b) (amended by Chapter 407) (defining sexual orientation as heterosexuality, homosexuality, or bisexuality).

5. CAL. PENAL CODE § 422.75(a) (amended by Chapter 407); *see also In re* M.S., 22 Cal. App. 4th 988, 1011, 22 Cal. Rptr. 2d 560, 573 (1993) (holding that California's hate crime statutes are not unconstitutionally overbroad); *In re* Joshua H., 13 Cal. App. 4th 1734, 1746, 17 Cal. Rptr. 2d 291, 298 (1993) (holding that the California hate crime statutes do not regulate speech, but regulate acts of violence intended to interfere with a victim's rights); *cf.* 18 U.S.C.A. § 245 (b)(2) (West 1969 & Supp. 1994) (prohibiting any person by color of law, force, or threat of force to injure, intimidate, or interfere with another because of the victim's race, color, religion, or national origin); FLA. STAT. ANN. § 775.085 (1) (West 1992) (creating a felony or misdemeanor for prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, or national origin); IDAHO CODE §§ 18-7901, 18-7903 (1987) (prohibiting malicious harassment based on race, color, religion, ancestry, or national origin); MONT. CODE ANN. § 45-5-222 (1993) (providing a sentencing enhancement for crimes committed because of the victim's race, creed, religion, color, national origin, or involvement in civil or human rights activities); N.Y. PENAL LAW § 240.30 (McKinney 1989 & Supp. 1994) (defining aggravated harassment as a specific act with the intent to annoy, threaten, harass, or alarm another person); N.D. CENT. CODE § 12.1-14-04 (1985) (providing that it is a misdemeanor, whether or not the person is acting under color of law, to injure, intimidate, or interfere with another because of sex, race, color, religion or national origin); OKLA. STAT. ANN. tit. 21, § 850 (West Supp. 1994) (prohibiting malicious intimidation or harassment because of race, color, religion, ancestry, national origin, or disability); VT. STAT. ANN. tit. 13, § 1455 (Supp. 1993) (prohibiting hate motivated crimes maliciously motivated by the victim's actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forced of the United States, handicap, or sexual orientation); WASH. REV. CODE ANN. § 9A-36.080 (West Supp. 1994) (creating the crime of malicious harassment based on one's perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical or sensory handicap); WIS. STAT. ANN. § 939.645 (West Supp. 1993) (prohibiting intentional crimes based on an actor's belief or perception regarding race, religion, color, disability, sexual orientation, national origin or ancestry, whether or not the actor's belief was correct). *But see* R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2547-48 (1992) (holding that a city ordinance, which creates a crime of disorderly conduct for displaying a public or private symbol or instrument which arouses anger or resentment, is unconstitutional); Anthony S. Winer, *The* R.A.V. *Case and the Distinction Between Hate Speech Laws and Hate Crime Laws*, 18 WM. MITCHELL L. REV. 971, 971-78 (1992) (indicating that the United States Supreme Court has not decided the constitutionality of a hate crime law, but instead has focused primarily upon hate speech laws).

6. CAL. CIV. CODE § 51.7 (amended by Chapter 407); *see id.* § 51 (West 1982 & Supp. 1994) (creating the Unruh Civil Rights Act, which declares equal rights to all person within the State regardless of personal characteristics); *see also* Michael S. Dugan, *"Adding the First Amendment to the Fire:" Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1109-10 (1993) (defining hate crimes as criminal acts committed against particular victims because of the assailants' perceptions of the victim's race, national origin, religion, or other bias-related classification; and adding that a particularly heinous component of the conduct is the infliction of violence upon victims solely because of the assailant's hatred of the particular class to which the victim belongs).

7. CAL. PENAL CODE § 422.6(a) (amended by Chapter 407).

In addition, under existing law, any crime that is not punishable by imprisonment in the state prison or county jail is punishable by imprisonment not to exceed one year, by a fine not to exceed $10,000, or both, if the crime is committed for the purpose of intimidating or interfering with an individual's free exercise of any right secured based on the above mentioned criteria.[8]

Existing law further provides that the fact a person committed a felony or attempted to commit a felony because of race, color, religion, nationality, country of origin, ancestry, disability, gender, or sexual orientation will be considered a circumstance in aggravation of the crime in imposing a term of sentencing.[9]

Chapter 407 provides that if the defendant commits a felony or attempts to commit a felony because he or she perceives[10] that the other person has one or more of the above mentioned traits, he or she will be punished with an additional term of one, two, or three years in the state prison at the court's discretion.[11]

## INTERPRETIVE COMMENT

Chapter 407 was created to clarify the phrase "because of" in California Civil Code section 51.7 and California Penal Code sections 422.6, 422.7, 422.75, and 1170.75 which refers to the defendant's knowledge or belief about the victim.[12] According to district attorneys who have been contacted, the knowledge or belief element is already implicit in the statute, but sometimes monetary resources are expended as a result of the statute not being explicit.[13] For district attorneys, a clarification of the standard will be helpful in prosecuting hate crime defendants.[14] Under the new standard, the defendant does not have to "know" the victim's personal characteristics, but instead intend must to harm the victim because of what the defendant "perceives" to be the victim's characteristics.[15]

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8. *Id.* § 422.7 (amended by Chapter 407).

9. *Id.* § 1170.75 (amended by Chapter 407).

10. *See* CAL. EVID. CODE § 170 (West 1966) (defining perceives as to acquire knowledge through one's senses); *see also* WEBSTER'S UNIV. DICTIONARY 872 (1988) (defining perceives as to become aware of something directly through the senses).

11. CAL. CIV. CODE § 51.7 (amended by Chapter 407); CAL. PENAL CODE §§ 422.6-422.75, 1170.75 (amended by Chapter 407).

12. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1595, at 2 (Apr. 26, 1994); *see id.* (stating that SB 1595 does not create any additional protected classes of people but instead only clarifies that statute with regard to the defendant's knowledge); *see also* CAL. CIVIL CODE § 51.7(a), CAL. PENAL CODE §§ 422.6, 422.7, 422.75, 1107.75 (amended by Chapter 407) (providing clarification of the "because of" language to mean what the defendant perceives).

13. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1595, at 2 (Apr. 26, 1994); *see id.* (indicating that district attorneys spend additional time litigating this issue since the statute is not explicit about the knowledge or belief element; thus greater prosecutorial resources are expended).

14. *Id.*

15. CAL. CIV. CODE § 51.7 (amended by Chapter 407); CAL. PENAL CODE §§ 422.6, 422.7, 422.75, 1107.75 (amended by Chapter 407).

Statistics indicate that hate crimes are increasing in the State of California, and that many of these hate crimes do not result in convictions.[16] Although law enforcement believes that many of these crimes are not reported out of fear or distrust for the legal system, a clarification of the defendant's belief may be necessary to augment an increasing problem.[17]

Perhaps the answer to curbing hate crimes may lie in education.[18] Several people have suggested that at the heart of every hate crime lies the fear of those who are different from ourselves, and fear can translate into violence.[19] Learning about the differences of an individual, and not fearing these differences may be an overly idealistic approach to solving the hate crime problem in California, but the figures suggest that something is needed to slow the violence.[20] Chapter 407 may decrease the violence by easing a prosecutor's burden, but much remains in curbing the hate and fear itself.[21]

*Anthony J. Enciso*

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16. Denise Hamilton, *Gay Men Become No. 1 Hate-Crime Targets*, L.A. TIMES, May 10, 1994, at B1; *see id.* (providing statistics from Southern California showing that hate crimes were up 6.4% overall in 1993, and indicating that gay men were targeted in 27% of the 783 hate crimes logged with 22.9% aimed at African-Americans, 14.6% directed at Jews, and other groups including Whites, Latinos, and Lesbians); *see also* Denise Hamilton, *Combatting Hate*, L.A. TIMES, May 17, 1994, at B1 (stating that a vast majority of hate crimes will go unreported or unpunished due to fear, intimidation, or humiliation); Reuter, *Hate Crime by Blacks Rising, Group Says*, WASH. POST, Dec. 14, 1993, at A14 (claiming that there is a shocking reversal in the pattern of hate crimes as seen by the violence of blacks against whites, Asians, and Hispanics escalating at an alarming rate). *See generally* Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting American Violence Against Women*, 2 AM. U. J. GENDER & L. 63, 63-65 (1994) (arguing that many of the crimes committed against women should be characterized as hate crimes since they are motivated by hatred of women and a desire to control and terrorize women); Ruthann Robson, *Incendiary Categories: Lesbians/Violence/Law*, 2 TEX. J. WOMEN & L. 1, 1-3 (1993) (stating that much violence against lesbians is not from dominance over men, but anger over asserting or appropriating male values).

17. Tony Bizjak, *Crimes Against Asians Tallied—Group Tracks Racial Attacks*, SACRAMENTO BEE, Apr. 25, 1994, at B1; *see id.* (adding that police should have better tactics to monitor the actual amount of hate crimes which occur throughout California, and that the number of hate crimes may be much higher than reported).

18. Bill Lindelof, *Churchgoers to Get Anti-Racism Message*, SACRAMENTO BEE, May 14, 1994, at SC10; *see id.* (indicating that most people have racial attitudes and may not even be aware of them).

19. *Id.*

20. Hamilton, *supra* note 16, at B1.

21. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1595, at 2 (July 5, 1994).

## Crimes; sentence enhancement—money laundering

Penal Code §§ 186.9, 186.10, 1170.1, 14161, 14166 (amended).
AB 3205 (Knight); 1994 STAT. Ch. 1187

Existing law prohibits the laundering of money procured through unlawful activity.[1] Existing law defines monetary instruments as well as what businesses or institutions constitute financial institutions in relation to the laws regarding money laundering.[2] Chapter 1187 expands the definition of financial institutions in the context of money laundering to include individuals or businesses regularly engaging in gaming, poll selling, bookmaking, horse racing, operating a gambling ship, and legal gambling.[3] Chapter 1187 also modifies the definition of monetary instrument to include foreign bank drafts[4] issued by any foreign country and payment warrants issued by the United States, this state, or any city, county, or any other political subdivision of this state.[5]

Existing law provides that the punishment for money laundering is one year of imprisonment in either a county jail or the state prison and/or a fine.[6] Chapter

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1. CAL. PENAL CODE § 186.10(a) (amended by Chapter 1187); *see id.* § 186.10 (amended by Chapter 1187) (setting forth the elements of a money laundering offense); *see also* 18 U.S.C.A. § 1956 (West Supp. 1994) (providing that anyone who conducts or attempts to conduct a financial transaction which involves the proceeds of specified unlawful activity knowing that the transaction is designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity or to avoid a transaction reporting requirement under state or federal law will be sentenced to a fine of not more than $500,000, or twice the value of the property involved, or imprisonment for not more than two years or both); United States v. So, 755 F.2d 1350, 1355 (9th Cir. 1985) (holding that deposits that are part of a pattern exceeding the threshold may be charged as separate felonies once the minimum threshold has been reached, even though the transactions individually would not trigger any reporting requirements); *cf.* ARIZ. REV. STAT. ANN. § 13-2317 (Supp. 1993) (providing that the offense of money laundering includes making property available to another with knowledge that it is intended to facilitate racketeering, or conducting a transaction with knowledge or with reason to have knowledge that the property involved was acquired unlawfully and with the intent to conceal or disguise the nature, location, source, ownership, or control of the property or the intent to avoid a transaction reporting requirement). *See generally* Kelly N. Carpenter, *Money Laundering*, 30 AM. CRIM. L. REV. 813 (1993) (discussing money laundering); David O. Stewart, *Raising the Stakes: Resisting the Upward Transformation of Antitrust and Fraud Charges*, 20 AM. J. CRIM. L. 207 (1993) (discussing money laundering and the usage of criminal actions as a tool of ensuring compliance with governmental regulations).

2. CAL. PENAL CODE § 186.9(b), (d) (amended by Chapter 1187); *see id.* § 186.9(b) (amended by Chapter 1187) (setting forth the definition for financial institution); *id.* § 186.9(d) (amended by Chapter 1187) (setting forth the definition for monetary instrument); *see also* 18 U.S.C.A. § 1956(c)(5) (West 1982) (defining monetary instrument); *id.* § 1956(c)(6) (West 1982) (giving financial institution the same definition as applies in regard to reporting requirements for financial transactions); 31 U.S.C.A. 5312(a)(1) (West 1982) (defining financial agency); *id.* § 5312(a)(2)(A)-(Y) (West 1982) (defining financial institution by example and in the context of reporting requirements for financial transactions).

3. CAL. PENAL CODE § 186.9(b) (amended by Chapter 1187).

4. *See id.* § 186.9(f) (amended by Chapter 1187) (defining foreign bank draft as a bank draft or check issued or made out by, *inter alia*, a foreign bank, savings and loan, casa de cambio, credit union, currency dealer, check cashing business, or insurance company).

5. *Id.* § 186.9(d) (amended by Chapter 1187).

6. *Id.* § 186.10(a) (amended by Chapter 1187); *cf.* ILL. ANN. STAT. ch. 720, para. 5/29B-1(c)(1) (Smith-Hurd Supp. 1994) (providing that the laundering of criminally derived property of a value not exceeding $10,000 is a Class 3 felony); *id.* ch. 730, para. 5/5-8-1(a)(6) (Smith-Hurd Supp. 1994) (providing

1187 provides for an enhanced felony sentence that imposes an additional term of imprisonment, if imprisoned in the state prison, the length of which is determined according to the amount of money involved in the offense or offenses.[7] Existing law provides a method for determining sentences resulting from two or more felony convictions for which consecutive terms are imposed.[8] Chapter 1187 makes the sentence enhancements prescribed for money laundering applicable to the provisions regarding the determination of sentencing for two or more felony convictions.[9] Chapter 1187 further provides the court with the discretion to strike the enhanced sentence of a money laundering offense if there are circumstances which mitigate the additional punishment.[10]

Existing law requires financial institutions to record and report certain monetary instrument transactions in order to assist in criminal investigations and proceedings.[11] Chapter 1187 modifies the definition of monetary instruments and

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that the sentence for a Class 3 felony is imprisonment of not less than two years and not more than five years); *id.* ch. 720, para. 5/29B-1(c)(2) (Smith-Hurd Supp. 1994) (providing that the laundering of criminally derived property of a value exceeding $10,000 but not exceeding $100,000 is a Class 2 felony); *id.* ch. 730, para. 5/5-8-1(a)(5) (Smith-Hurd Supp. 1994) (providing that the sentence for a Class 2 felony is imprisonment of not less than three years and not more than seven years); *id.* ch. 720, para. 5/29B-1(c)(3) (Smith-Hurd Supp. 1994) (providing that the laundering of criminally derived property of a value exceeding $100,000 is a Class 1 felony); *id.* ch. 730, para. 5/5-8-1(a)(4) (Smith-Hurd Supp. 1994) (providing that the sentence for a Class 1 felony, other than second degree murder, shall be imprisonment of not less than four years and not more than 15 years). *But see Money Laundering Sanctions May be Reduced*, [3 DOJ ALERT 4] Sent. Guidelines (P-H) No. 2 (Feb. 1993) (discussing a proposed amendment to the federal sentencing guidelines which would reduce the penalties for money laundering).

7. CAL. PENAL CODE § 186.10(c) (amended by Chapter 1187); *see id.* § 186.10(c)(1)(A) (amended by Chapter 1187) (providing that an additional term of imprisonment of one year is imposed on individuals punished under California Penal Code § 186.10(a) for a transaction exceeding $50,000 in value but less than $150,000); *id.* § 186.10(c)(1)(B) (amended by Chapter 1187) (providing for a two year sentence enhancement for transactions exceeding $150,000 in value but less than $1,000,000); *id.* § 186.10(c)(1)(C) (amended by Chapter 1187) (providing for a three year sentence enhancement for transactions exceeding $1,000,000 in value but less than $2,500,000); *id.* § 186.10(c)(1)(D) (amended by Chapter 1187) (providing for a four year sentence enhancement for transactions exceeding $2,500,000); *see also* United States v. Morales-Vasquez, 919 F.2d 258, 265 (5th Cir. 1990) (holding that dividing cash into amounts below $10,000 in order to evade reporting requirements constitutes a structured transaction which warrants applicability of the provisions relating to a higher offense under federal sentencing guidelines); *cf.* U.S. SENT. COMM'N, FED. SENT. GUIDELINES MANUAL § 2S1.1 (West 1993) (providing the federal sentencing guidelines for money laundering offenses); ILL. ANN. STAT. ch. 720, para. 5/29b-1 (Smith-Hurd Supp. 1994) (providing that laundering of criminally derived property of a value not exceeding $10,000 is a Class 3 felony; that laundering of criminally derived property of a value exceeding $10,000 but not exceeding $100,000 is a Class 2 felony; laundering of criminally derived property of a value exceeding $100,000 is a Class 1 felony); UTAH CODE ANN. § 76-3-203.1 (Supp. 1993) (providing for enhanced penalties for money laundering offenses that are committed in concert by three or more persons).

8. CAL. PENAL CODE § 1170.1(a) (amended by Chapter 1187); *see id* (providing that the aggregate term of imprisonment imposed for consecutive terms resulting from two or more convictions is the sum of the principal term, the subordinate term, and certain additional terms); *id.* (providing that the principal term consists of the greatest term imposed by the court, including any enhancements imposed by particular sections).

9. *Id.* § 1170.1(a) (amended by Chapter 1187).

10. *Id.* § 1170.1(h) (amended by Chapter 1187).

11. *Id.* § 14166 (amended by Chapter 1187); *see* 31 U.S.C.A. §§ 5313, 5314 (West 1983 & Supp. 1994) (proscribing the reporting of monetary transactions exceeding $10,000); CAL. PENAL CODE § 14162 (West Supp. 1994) (providing that a financial institution shall make and keep a record of each transaction to the financial institution which involves currency of more than $10,000 or results in the exchange of a monetary

financial institutions and adds the definition of currency in order to conform to definitions established under federal law.[12] Existing law provides that any person who willfully violates the provision relating to reporting certain financial transactions or who makes an inaccurate or incomplete report for the purpose of disguising, promoting, or facilitating criminal activity is punishable by imprisonment and/or a fine.[13]

INTERPRETIVE COMMENT

The Legislature, in providing for enhanced penalties for money laundering offenses, apparently intended Chapter 1187 to discourage individuals from

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instrument or instruments of a value in excess of $10,000); *see also* 31 U.S.C.A. § 5311 (West 1983) (indicating that it is the intent of Congress to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings); CAL. PENAL CODE § 14160 (West 1992) (stating that the purpose of this title is to require certain reports or records of transactions involving monetary instruments, as defined herein, where those reports or records have a high degree of usefulness in criminal investigations). *See generally* Emily J. Lawrence, Note, *Let the Seller Beware: Money Laundering, Merchants and 18 U.S.C. §§ 1956, 1957,* 33 B.C. L. REV. 841 (1992) (discussing in general the reporting provisions under the federal money laundering statute).

12. CAL. PENAL CODE § 14161 (amended by Chapter 1187); *see* 31 U.S.C.A. § 5312(a)(2)(A)-(Y) (West 1982 & Supp. 1994) (defining financial institution as an insured bank, a commercial bank or trust company, a private banker, an agency or branch of a foreign bank in the United States, an insured institution of the National Housing Act, a thrift institution, a broker or dealer registered with the Securities Exchange Commission under the Securities Exchange Act of 1934, a broker or dealer in securities or commodities, an investment banker or investment company, a currency exchange, an issuer, redeemer, or cashier of travelers checks, checks, money orders, or similar instruments, an operator of a credit card system, an insurance company, a dealer in precious metals, stones, or jewels, a pawnbroker, a loan or finance company, a travel agency, a licensed sender of money, a telegraph company, a business engaged in vehicle sales, persons involved in real estate closing and settlements, the United States postal service, an agency of the United States government or of a state or local government, or any business or agency designated by the secretary whose cash transactions have a high degree of usefulness of criminal tax or regulatory matters); *id.* § 5312(a)(3)(A)-(B) (West 1983) (defining monetary instrument as U.S. coins and currency, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and as may be prescribed by specific regulation); *see also* United States v. Schmidt, 947 F.2d 362, 370-71 (9th Cir. 1991) (holding that a defendant who made financial transactions with money that was known to be from a criminal enterprise was a financial institution for the purposes of the federal money laundering statute, since private individuals and money launderers are encompassed within the definition of a financial institution); United States v. Tannenbaum, 934 F.2d 8, 12 (2d Cir. 1991) (holding that the duty to report currency transactions is applicable to transactions between private individuals which exceed $10,000, since the definition of financial institution applies to persons engaged in dealing or exchanging currency, and thus provided adequate notice to private individuals of their duty to report); United States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990) (holding that transferring title to a vehicle constitutes a financial transaction within the meaning of the federal money laundering statute, since this term includes the purchase, sale or disposition of any kind of property, as long as it involves a monetary instrument); United States v. Bucey, 876 F.2d 1297, 1303 (7th Cir. 1989) (holding that the defendant was not a financial institution and thus could not be convicted for failing to file currency transaction reports upon receipt of currency in excess of $10,000); United States v. Robinson, 832 F.2d 1165, 1166 (9th Cir. 1987) (holding that a bank teller who was acting as a private individual was not a financial institution within meaning of currency transaction reporting statutes and thus did not have a duty to file a currency transaction report); United States v. Espriella, 781 F.2d 1432, 1436 (9th Cir. 1986) (providing that the term financial institution is to be given a broad definition and is intended to encompass any business or agency that carries out similar, related, or substitute duties which the Secretary of the Treasury prescribes).

13. CAL. PENAL CODE § 14166 (amended by Chapter 1187).

engaging in money laundering schemes and to combat the deluge of drug proceeds being laundered through financial institutions in California.[14] Moreover, in changing the definition of particular terms, the Legislature sought to establish conformity with existing federal law, thereby facilitating prosecution.[15]

*Laura J. Fowler*

**Criminal Procedure; sentence enhancement—prior foreign conviction**

Penal Code § 668 (amended).
AB 3591 (Rainey); 1994 STAT. Ch. 179
*(Effective June 27, 1994)*

Under existing law, a prisoner convicted in California who has prior convictions in other states for crimes punishable in California can have those prior convictions used as a basis for sentence enhancements in California.[1] Chapter 179 clarifies the meaning and intent of existing law by abrogating case law[2] and declaring that prior violations similar to any California statute can result in sentence enhancements for subsequent crimes committed in California.[3]

14. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 3205, at 2 (Apr. 19, 1994); *see* 31 U.S.C.A. § 5313 (West 1983) (providing that one of the reasons underlying the enactment of the money laundering offenses includes the creation of a sweeping law enforcement tool for locating large transfers in currency of proceeds of unlawful transactions); *see also Espriella*, 781 F.2d at 1436 (holding that the federal statutes and regulations which define financial institution as any person engaged in the business of dealing in or exchanging currency is consistent with Congress' intent in enacting the Currency Transaction Reporting Act); United States v. Turner, 639 F. Supp 982, 991 (E.D. N.Y. 1986) (stating that the clear intent of Congress in enacting the Money Laundering Penalties Act of 1984 was to facilitate efforts of customs service to encourage more people to file currency transaction reports). *See generally* Larry D. Thompson & Elizabeth B. Johnson, *Money Laundering: Business Beware*, 44 ALA. L. REV. 703 (1993) (discussing the federal money laundering provisions and the reporting requirements that are thereunder applicable to businesses).

15. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3205, at 3 (June 14, 1994).

1. CAL. PENAL CODE § 668 (amended by Chapter 179).

2. *See* People v. Burgio, 16 Cal. App. 4th 769, 778, 20 Cal. Rptr. 2d 397, 402 (1993) (holding that only statutorily enumerated prior convictions could be used for sentence enhancements).

3. CAL. PENAL CODE § 668 (amended by Chapter 179); *see id.* (declaring that this statute will apply to all California Penal Code statutes providing for enhancements for prior convictions and prior prison terms).

## INTERPRETIVE COMMENT

Chapter 179 is the legislative response to the holding in *People v. Burgio*[4] which interpreted California Penal Code section 668.[5] The California Court of Appeal in *Burgio* interpreted existing statutory law, holding that for enhancements based on prior foreign convictions to be valid, each individual enhancement statute must specifically state that it includes prior foreign convictions.[6] Twenty-seven sentence enhancement laws were jeopardized by the *Burgio* ruling.[7] Chapter 179 abrogates the *Burgio* decision by declaring legislative intent in that regard and by amending Penal Code section 668 to apply to all sentence enhancement statutes.[8]

*Chris J. Ore*

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4. 16 Cal. App. 4th 769, 20 Cal. Rptr. 2d 397 (1993).

5. 1994 Cal. Legis. Serv. ch. 179, sec 2, at 1388 (amending CAL. PENAL CODE § 668); *see id.* (declaring that it is the intent of the Legislature to abrogate the holding of *People v. Burgio* because the decision incorrectly states existing law and it ignores the controlling statutory law).

6. *Burgio*, 16 Cal. App. 4th at 777-79, 20 Cal. Rptr. 2d at 402-403 (1993).

7. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3591, at 3 (June 14, 1994); *see id.* (listing a number of the code sections that were affected by the *Burgio* holding: California Penal Code §§ 273(b), 422.75(d); 451(c); 548(b); 550(d); 666.5(a); 666.7(a); 667.51(a), (d); 667.6(a)-(b); 667.7(a)(1)-(2); 667.71(b)-(c); 667.9(b); 667.10(a); 670(c); California Health and Safety Code § 11353.4(a); California Insurance Code §§ 1871.4(c); 11760(b), and 11880(b)). *But see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3591, at 3 (June 14, 1994) (stating that the only statutes that would withstand the scrutiny of *Burgio* were California Penal Code §§ 190.05, 667, and 667.5).

8. CAL. PENAL CODE § 668 (amended by Chapter 179); 1994 Cal. Legis. Serv. ch. 179, sec 2, at 1388.

## Crimes; sentence enhancement—repeat offenders: "three strikes you're out"

Penal Code § 667 (amended).
AB 971 (Jones); 1994 STAT. Ch. 12
*(Effective March 7, 1994)*

*Editor's Note: The author of this review will publish a more in-depth analysis of the "Three-Strikes" bill in the next edition of the Pacific Law Journal (Vol. 26, Apr. 1995). This forthcoming Legislative Note will examine the constitutional and social issues raised by the passage of AB 971 and its probable impact on the State of California.*

Existing law provides that one who is presently convicted of a serious felony[1] and has been previously convicted of a serious felony in California or an equivalent felony[2] in another state will receive, in addition to the sentence for the present felony, a five-year sentence enhancement for each prior felony conviction on charges separately brought and tried.[3]

Chapter 12 augments existing sentence enhancements by providing for increased terms of imprisonment for felons convicted of second and third offenses.[4] Under Chapter 12, defendants with one prior serious felony conviction will receive twice the term which they would otherwise receive for the current conviction.[5] Defendants with two or more prior convictions will be sentenced to an indeterminate term of imprisonment for life with a minimum term of the greatest of three penalties: Three times the term otherwise provided for the

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1. *See* CAL. PENAL CODE § 667(d) (amended by Chapter 12) (defining a felony, for the purposes of this section, as a serious felony as defined in California Penal Code § 1192.7); *see also id.* § 667(a)(5) (amended by Chapter 12) (excluding from the definition of serious felony, convictions for selling or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in California Penal Code § 1192.7(c)(24)); *id.* § 1192.7(c)(1)-(28) (West Supp. 1994) (defining a serious felony as any of a number of enumerated offenses including both violent crimes and drug-related offenses and conspiracies to commit such offenses).

2. *See* CAL. PENAL CODE § 667(d)(2) (amended by Chapter 12) (defining a prior felony conviction in part as a conviction in another jurisdiction for an offense that, if committed in California, would be punishable by imprisonment in the state prison or conviction in another jurisdiction for an offense that includes all of the elements of a serious felony as defined in California Penal Code § 1192.7(c)).

3. *Id.* § 667(a)(4) (amended by Chapter 12).

4. *Id.* § 667 (amended by Chapter 12).

5. *Id.* § 667(e)(1) (amended by Chapter 12); *see id.* (requiring double prison terms for determinate sentences and twice the minimum term for indeterminate sentences); *see also id.* § 1170(a)(1) (West Supp. 1994) (providing for sentences of definite duration in order to provide for uniformity of sentencing); E. Barrett Prettyman, *The Indeterminate Sentence and the Right to Treatment*, 11 AM. CRIM. L. REV. 7, 13 n. 27 (1972) (discussing the definition of indeterminate sentencing and providing a comparison with the notion of indefinite sentencing). *See generally* Allen Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 304-15 (1974) (discussing the history of indeterminate sentencing).

current felony, twenty-five years imprisonment in state prison, or the term for the underlying conviction including all applicable enhancements.[6]

Chapter 12 additionally ostensibly proscribes the use of prior felony convictions in plea bargaining,[7] and the prosecution must plead and prove all prior felony convictions without entering into agreements to strike or dismiss any prior felony conviction.[8] However, prosecuting attorneys have the latitude under Chapter 12 to dismiss or strike a prior felony conviction allegation in the furtherance of justice.[9]

Chapter 12 eliminates several practices whereby sentence terms are reduced or tempered.[10] The court must adhere to certain enumerated prohibitions including those related to aggregate term limitations,[11] probation, consideration of the time between a prior conviction and the current felony, diversion to any other facility but the state prison, credits[12] which may not exceed one fifth of the total term imposed, and consecutive sentencing for multiple felonies not committed on the same occasion.[13]

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6. CAL. PENAL CODE § 667(e)(2)(A) (amended by Chapter 12); *see id.* § 667(e)(2)(A)(iii) (amended by Chapter 12) (proscribing the use of determinate sentences found in California Penal Code § 1170 as a source for one of the options and including enhancements found in the same section); *see also id.* § 667(e)(2)(B) (amended by Chapter 12) (providing that indeterminate sentences imposed under § 667(e)(2)(A) are to be served consecutively with any other term that may be accompanied by a consecutive sentence); *id.* § 1170 (West Supp. 1994) (establishing determinate sentences to be used in the absence of mitigating circumstances).

7. *See id.* § 1192.7(b) (West Supp. 1994) (defining plea bargaining as any bargaining, negotiation, or discussion between a criminal defendant or his or her attorney and the prosecuting attorney or judge wherein the defendant agrees to plead guilty or nolo contendere in exchange for promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge regarding charging or sentencing).

8. *Id.* § 667(g) (amended by Chapter 12).

9. *Id.* § 667(f)(2) (amended by Chapter 12); *see id.* § 1385(a) (West Supp. 1994) (providing that a judge or magistrate may, in the furtherance of justice, order an action to be dismissed upon is or her own motion or upon the application of the prosecuting attorney).

10. *Id.* § 667(c) (amended by Chapter 12).

11. See *id.* § 1170.1(b)(1) (West Supp. 1994) (providing for the calculation of aggregate terms where consecutive terms of imprisonment are imposed under California Penal Code §§ 669 and 1170).

12. *See id.* §§ 2930-2932 (West Supp. 1994) (containing provisions for credit on terms of imprisonment).

13. *Id.* § 667(c)(1)-(8) (amended by Chapter 12).

## COMMENT

Public outrage over the highly publicized kidnapping and murder case of 12-year-old Polly Klaas[14] provided the impetus for passage of Chapter 12 which was proffered as an answer to the need for tougher penalties for repeat offenders.[15] Chapter 12 will face legislative and legal challenges on a variety of issues by those who believe the act is unfair or overly broad in its inclusion of nonviolent felons.[16] A variety of legislative attempts to modify the provisions of Chapter 12 have been unsuccessful while an initiative known as "Three Strikes You're Out"[17] is currently in the offing although similar, in many respects, to Chapter 12.[18] In addition, Chapter 12 will face possible federal preemption should Congress pass HR 4055 which contains its own "three strikes and you're out" provision.[19]

Chapter 12 will face constitutional challenges and many appeals to third strike sentences will likely take the form of Eighth Amendment based arguments that life imprisonment for occasionally benign felonies offends the constitutional

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14. *See* Michael Otten, *California Governor Calls Crime Crackdown Session*, REUTERS, Dec. 29, 1993, *available in* LEXIS, News Library, Curnws File (reporting facts surrounding the discovery of the body of Polly Klaas and the apprehension of Richard Davis, the man accused of kidnapping and murdering Klaas); *see also* Jim Herron Zamora, *Winona Ryder Offers Reward in Kidnap Case*, S.F. EXAM., Oct. 11, 1993, at A4 (containing an early report of the kidnapping case of Polly Hannah Klaas and describing the circumstances surrounding her abduction before the subsequent discovery of her body).

15. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 971, at 2 (Jan. 6, 1994); *see* Otten, *supra* note 14 (reporting on a special state legislative session ordered by California Governor Pete Wilson on the subject of stricter sentences for violent criminals and citing statements by Wilson referring to the kidnapping and murder of Polly Klaas in arguing for public support of anti-crime legislation).

16. Telephone Interview with Burton R. Loehr, Supervising Attorney for the Research Section of the Sacramento County Public Defender's Office (Sept. 26, 1994) (Copy on file with the *Pacific Law Journal*).

17. *See Increased Sentences. Repeat Offenders Initiative Statute, Proposition 184*, Nov. 8, 1994 California General Election (adding Penal Code 1170.12); *see also* ASSEMBLY WAYS AND MEANS COMMITTEE, COMMITTEE ANALYSIS OF AB 971, at 2 (Jan. 26, 1994) (stating that the "three strikes you're out" initiative is essentially the same as Chapter 12).

18. ASSEMBLY WAYS AND MEANS COMMITTEE, COMMITTEE ANALYSIS OF AB 971, at 2 (Jan. 26, 1994); *see id.* (noting four other bills proposed to modify the provisions of Chapter 12 but which later failed passage and were amended to accomplish other purposes: AB 167 authored by Assemblyman Tom Umberg, AB 1568 authored by Assemblyman Richard Rainey, AB 2429/ABX 9 by Assemblyman Ross Johnson, and SB 864 by Senator Quentin Kopp); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 864, at 3 (June 21, 1994) (providing that a third strike resulting in life imprisonment without parole will only occur where a violent felony has been committed); SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 167, at 2 (Feb 28, 1994) (changing the sentencing provisions of Chapter 12 to provide for different term enhancements for felons depending upon whether the prior felonies were violent, serious, or a combination of the two); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2429, at 1-2 (Mar. 3, 1994) (containing provisions similar to those found in AB 1568, but applying only to third or greater repeat felony convictions and additionally providing for the development of an antirecidivism plan for inmates under the age of 25 who are serving sentences for first-time felony convictions); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1568, at 1 (Mar. 3, 1994) (providing for a fixed ten-year enhancement for each prior violent felony rather than the doubling or tripling provisions of Chapter 12); *id.* at 1, 3-7 (providing additions to the lists of serious or violent felonies found in California Penal Code §§ 1192.7(c) and 667.5(c)(1)-(17) respectively).

19. H.R. 4055, 103d Cong., 2d Sess. § 701 (1994); *see id.* (providing for enhanced prison terms for violent felons with two prior violent felonies and subjection to the death penalty where the prior violent felonies resulted in death).

prohibition of cruel or unusual punishment.[20] However, proponents of Chapter 12 argue that such a position betrays a misunderstanding of the provisions of the act which require a succession of either violent or "serious" felonies as defined in the Penal Code.[21] Chapter 12 is additionally criticized as repugnant to the Due Process Clause of the Fourteenth Amendment[22] due to its use of juvenile offenses in sentence enhancement.[23]

With regard to implementation of the sentencing provisions of Chapter 12, some argue that the new law will simply not achieve the results[24] expected by its supporters.[25] However, proponents argue that Chapter 12 should have the opportunity to perform, given the burgeoning threat posed by crime.[26] Thus,

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20. U.S. CONST. amend. VIII; *see id.* (proscribing the imposition of excessive bail, excessive fines, or the infliction of cruel and unusual punishments); Debra J. Saunders, *Is it Back to the Bastille?*, S.F. CHRON., Mar. 4, 1994, at A22 (suggesting that the language of Chapter 12 will result in successful constitutional challenges because petty felons may suffer grossly unproportional sentences). *See generally* Wayne S. Grajewski, Comment, *Prohibiting Cruel or Unusual Punishment: California's Requirement of Proportionate Sentencing After Wingo and Rodriguez*, 9 U.S.F. L. Rev. 524, 525-39 (1976) (discussing California's approach to the doctrine of proportionality and its application to criminal sentencing in the state); Barton C. Legum, Comment, *Down the Road Toward Human Decency: Proportionality Analysis and Solem v. Helm*, 18 GA. L. REV. 109, 111 (1983) (discussing the principle that the severity of the punishment should not be greatly disproportionate to the gravity of the offense committed and exploring the principle's enunciation in the Eighth Amendment prohibition of cruel and unusual punishment); *id.* at 125-26 (describing several criteria for determining the proportionality of a sentence, including (1) assessment of the harshness of the penalty in light of the gravity of the crime; (2) comparison with other sentences imposed in the same jurisdiction for more serious offenses; and (3) comparison with sentences for the same crime imposed in other jurisdictions).

21. Bill Jones, *Three Strikes is Deserved Penalty for Serious or Violent Felonies*, SAN DIEGO UNION-TRIB., July 16, 1994, at B7; *see id.* (citing assertions made by the author of Chapter 12 that the law does not apply to petty felons but rather to serious or violent felons defined in California Penal Code §§ 1192.7 and 667.5).

22. *See* U.S. CONST. amend. XIV, § 1 (providing that no States shall deprive any person of life, liberty, or property without due process of law).

23. Stephen Green, *Court Panel Discovers Major Flaws in Three Strikes*, SAN DIEGO UNION-TRIB., Apr. 9, 1994, at A3; *see also* Robert G. Lane, Note, *Use of Juvenile Court Records in Fixing Sentence in a Subsequent Adult Criminal Proceeding*, 32 S. CAL. L. REV. 207, 210 (1959) (noting the constitutional problem with the use of juvenile sentences for adult sentencing as the fact that juvenile proceedings are not penal in nature and thus juvenile defendants do not have access to constitutional and procedural safeguards present as a matter of right in adult criminal trials); Green, *supra* (citing as a potential constitutional problem, the fact that offenses committed by juveniles may be counted as strikes for the purpose of sentencing).

24. *See supra* note 15 and accompanying text (discussing the legislative purpose behind enactment of AB 971).

25. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 971, at 5 (Jan 6, 1994); *see id.* (citing the belief of opponents to Chapter 12 that its provisions will be ineffective to address the problem of recidivism but will merely overload an already burdened prison system); *Initiative or No Initiative, "Three Strikes" is the Law in California*, CAL. J. WKLY., Mar. 14, 1994, at 2 (stating that criminology experts have doubted the deterrent effect of longer sentences and that Chapter 12 will simply impose increased costs on the court and prison systems).

26. Brad Hayward, *Panel Rejects Alternate "Three Strikes" Proposal*, SACRAMENTO BEE, June 22, 1994, at A3 (quoting a statement by Assemblymember Jim Costa that Chapter 12 should be given two or three years to develop a history which can then be used by legislators to arrive at other possible compromises).

Chapter 12 will likely continue to be refined by experience, both in the courts and in the State Legislature.

*Mark W. Owens*

**Crimes; sentence enhancement—ritualized child abuse**

Penal Code § 667.83 (new); § 1170.1 (amended).
SB 1997 (Russell); 1994 STAT. Ch. 1099

Existing law provides specified penalties for the following felony violations: (1) willful cruelty or unjustifiable punishment of a child;[1] (2) willful infliction of corporal punishment to a child resulting in traumatic injury;[2] (3) lewd or lascivious acts with children under age fourteen;[3] (4) kidnapping;[4] (5) rape;[5] (6) rape in concert;[6] (7) sodomy;[7] (8) oral copulation;[8] and (9) penetration with a

1. *See* CAL. PENAL CODE § 273a(a)(1) (West Supp. 1994) (establishing a sentence of two, four, or six years in state prison for a person convicted of willfully causing or permitting any child to suffer under circumstances or conditions likely to cause death or great bodily harm, or inflicting unjustifiable physical pain or mental suffering, or, while having care or custody of the child, willfully causing or permitting the child to be injured or placed in a situation such that the child's person or health is endangered).

2. *See id.* § 273d(a) (West Supp. 1994) (establishing a sentence of two, four, or six years in state prison, or a fine of up to $6000, or by imprisonment and fine, for a person convicted of willfully inflicting cruel or inhuman corporal punishment or injury resulting in a traumatic condition, defined in California Penal Code § 273.5(c) as a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force).

3. *See id.* § 288(a)-(b) (West Supp. 1994) (establishing a sentence of three, six, or eight years in state prison for a person convicted of willfully and lewdly committing lewd and lascivious acts with a child under the age of fourteen); *id.* § 288(c) (West Supp. 1994) (establishing a sentence of one, two, or three years in a state prison for a person convicted of committing lewd and lascivious acts with a child fourteen or fifteen years of age where the person is at least ten years older than the child); *id.* § 288(e) (West Supp. 1994) (establishing a fine of up to $5000 that may be imposed in addition to the above penalties).

4. *See id.* § 208(a) (West Supp. 1994) (specifying the sentence for kidnapping as three, five, or eight years); *id.* § 208(b) (West Supp. 1994) (specifying the sentence for the kidnapping of a child under the age of fourteen as five, eight, or eleven years, and further providing that the punishment is not applicable to the child's biological parent, natural father, adoptive parent, or a person who has been granted access to the child by a court order).

5. *See id.* § 264(a) (West Supp. 1994) (specifying the sentence for rape as three, six, or eight years in the state prison).

6. *See id.* § 264.1 (West 1988) (specifying the sentence for rape in concert as five, seven, or nine years in state prison).

7. *See id.* § 286(c) (West Supp. 1994) (providing various penalties for sodomy with a child based on the age of the child, the age of the perpetrator, whether force, violence, duress, menace, or fear of immediate and unlawful bodily injury were used to perpetrate the act, and whether the sodomy was committed in concert with another person).

8. *See id.* § 288a(c) (West Supp. 1994) (providing various penalties for oral copulation with a child based on the age of the child, the age of the perpetrator, whether force, violence, duress, menace, or fear of immediate and unlawful bodily injury were used to perpetrate the act, and whether the oral copulation was committed in concert with another person).

foreign object.[9] Under Chapter 1099, when a person is convicted of one of the above offenses, where the offense was committed as part of a ceremony, rite, or similar observance,[10] the sentence will be enhanced[11] by three years.[12]

Chapter 1099 provides exceptions for certain lawful practices, including agricultural, animal husbandry, food preparation, wild game hunting and fishing practices, the branding or identification of livestock, circumcision and its related ceremonies, and any state or federally approved, licensed, or funded research project.[13]

## INTERPRETIVE COMMENT

Many people in law enforcement and social services believe that ritualized child abuse cases are particularly harmful to children, are becoming more widespread, and that existing penalties are not commensurate with the trauma inflicted upon the child.[14] However, it is difficult to establish with any certainty how great the incidence is of such crimes.[15] Opponents of Chapter 1099 fear that

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9. *See id.* § 289(j) (West Supp. 1994) (providing various penalties for foreign object penetration on a child based on the age of the victim and the age of the perpetrator).

10. *See id.* § 667.83(b) (enacted by Chapter 1099) (defining actions that constitute a ceremony, rite, or similar observance for purposes of this section to include actual or simulated torture, mutilation, or sacrifice of any mammal, forced ingestion, or external application of human or animal urine, feces, flesh, blood, or bones, and placement of a living child into a coffin, open grave, or other confined area containing animal remains or a human corpse or remains); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1997, at 4 (June 14, 1994) (describing rituals or ceremonies that have been reported in the state, such as gang initiation rituals that involved the killing of small animals and the drinking of mixtures of blood, urine, and wine mixtures, white supremacists killing small animals to worship Satan, and juvenile sex orgies to worship Satan); Robin D. Perrin & Les Parrott, III, *Memories of Satanic Ritual Abuse: The Truth Behind the Panic*, CHRISTIANITY TODAY, June 21, 1993, at 18 (describing allegations of Satanic ritual abuse including sacrificial murder of animals, children, infants, and adults, and black masses and sexual torture).

11. *See* CAL. CT. R. 405(c) (1994) (defining enhancement). *See generally* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* § 1473(a) (2d ed. 1989 and Supp. 1994) (describing various types of sentence enhancements and pleading requirements).

12. CAL. PENAL CODE § 667.83 (enacted by Chapter 1099); *see id.* § 667.83(d) (requiring that for the enhancement to be given, the charges must be proven by the testimony of two witnesses, or of one witness and corroborating circumstances); *cf.* IDAHO CODE § 18-1506A (Supp. 1994); LA. REV. STAT. ANN. § 14:107.1 (West Supp. 1994); MO. ANN. STAT. § 568.060.3 (Vernon Supp. 1994); TEX. PENAL CODE ANN. § 12.47 (West Supp. 1994) (providing definitions and punishments for ritualized child abuse).

13. CAL. PENAL CODE § 667.83(c) (enacted by Chapter 1099).

14. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1997, at 1 (June 14, 1994); *see id.* at 4 (noting the concerns of law enforcement personnel that the incidence of these crimes are greater than publicly perceived); SENATE FLOOR, COMMITTEE ANALYSIS of SB 1997, at 5 (May 16, 1994) (stating that ritually abused children have more severe emotional problems than non-ritually abused children, with particular problems including early incidents of homicide, suicide, arson, and molestation by the victims); *see also* Larry Witham, *Satanic Ritual Abuse: Modern Horror or Hoax?*, WASH. TIMES, June 15, 1994, at A9 (noting that some groups claim that as many as 100,000 Americans have suffered ritual sexual abuse).

15. SENATE FLOOR, COMMITTEE ANALYSIS of SB 1997, at 5 (May 16, 1994). The Assembly Office of Research concluded that statutes already cover the types of crimes committed (i.e. murder, child molestation, kidnapping, etc.) and that there is tremendous controversy over whether ritual child abuse even exists. *Id. See also* Laura Mecoy, *Backlash Over Ritual Abuse*, SACRAMENTO BEE, June 13, 1994, at A1 (claiming that the public and media are becoming increasingly suspicious towards those who claim that they are victims of ritualized sexual abuse); Perrin & Parrott, *supra* note 10 (discussing the controversy surrounding satanic ritual

it will lead prosecutors to bring more ritual child abuse cases with slim evidence, which will generate long, costly trials with a possibility of long periods of incarceration for innocent defendants.[16]

*Johnnie B. Beer*

**Crimes; sentence enhancement—robbery**

Penal Code § 213 (amended).
AB 779 (Burton); 1994 STAT. Ch. 789

Existing law provides that robbery,[1] under specified circumstances, is robbery of the first degree,[2] punishable by imprisonment in the state prison for a term of

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abuse, and noting that while one group claims that the large number of those who make claims with similar details lends credibility to their stories, another group states that if there were so many people victimized, it would be impossible to conceal all the corroborating evidence); Mark Sauer, *Chasing Satan in Sacramento; Zealous Senator Pushes Law Adding Ritual-Abuse Penalties,* SAN DIEGO UNION-TRIB., June 16, 1994, at E1 (noting that investigations into ritualized abuse in Virginia, Minnesota, Michigan, Pennsylvania, Great Britain, Canada, and other countries, as well as an FBI investigation, all have turned up nothing); Brian Siano, *All the Babies You Can Eat,* THE HUMANIST, Mar. 1993, at 40 (decrying the fact that credible allegations of abuse may get lumped into the satanic panic and disregarded); Witham, *supra* note 14, at A9 (discussing the history of claims of ritualized sexual abuse and discussing the claims of groups who claim a nationwide conspiracy of ritual abuse and groups who work to protect those accused of ritualized abuse).

16. *See* Sauer, *supra* note 15 (discussing the Dale Akiki ritual-abuse case that lasted two and one-half years, ending in acquittal). Deputy Public Defender Kate Coyle stated that when crimes are on the books, district attorneys charge people on those offenses. *Id. See also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1997, at 5 (June 14, 1994) (stating that the McMartin Preschool trial was widely believed to have been forced on the Los Angeles County District Attorney by a deputy who was interested in running against his boss for the office); *The Salem Epidemic; Comparison of Ritual Child Sex Abuse Cases to Salem Witchcraft Trials,* NAT'L REV., Sept. 3, 1990, at 14 (discussing the increasing tendency of sexual abuse trials to become like witch hunts, with prosecutors and social workers badgering children to name more perpetrators, and noting that most cases have ended with the charges dropped).

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1. *See* CAL. PENAL CODE § 211 (West 1988) (defining robbery as the felonious taking of personal property in the possession of another, from his or her person or immediate presence, and against his or her will, accomplished by means of force or fear); *see also id.* § 212 (West 1988) (defining fear as either of the following: (1) The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or (2) the fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery); People v. Hayes, 52 Cal. 3d 577, 626-29, 802 P.2d 376, 406-08, 276 Cal. Rptr. 874, 904-07 (1990) (explaining how the element of immediate presence is applied in a criminal case), *cert. denied sub nom.* Hayes v. California, 112 S. Ct. 480 (1991); People V. Butler, 65 Cal. 2d 569, 572-74, 421 P.2d 703, 706-07, 55 Cal. Rptr. 511, 514-15 (1967) (discussing how the felonious intent applies to robbery).

2. *See* CAL. PENAL CODE § 212.5(a) (West Supp. 1994) (defining "robbery of the first degree" as every robbery of any person who is performing his or her duties as an operator of any bus, taxicab, cable car, streetcar, trackless trolley, or other vehicle, including a vehicle operated on stationary rails or on a track or rail suspended in the air, and used for the transportation of persons for hire; every robbery of any passenger which is perpetrated on any of these vehicles; and every robbery which is perpetrated in an inhabited dwelling house, a vessel which is inhabited and designed for habitation, an inhabited floating home, a trailer coach which is

three, four, or six years.[3] Chapter 789 increases the punishment, providing that where the defendant commits robbery of the first degree, voluntarily acting in concert with two or more persons, the defendant will instead be punished by imprisonment in the state prison for a term of three, six, or nine years.[4]

Existing law provides that an attempt[5] to commit an offense which is punishable by imprisonment in state prison is punishable by imprisonment in the state prison for one-half the term prescribed for the offense so attempted.[6] However, prior law provided that notwithstanding this provision of law,

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inhabited, or the inhabited portion of any other building); *id.* § 212.5(b) (West Supp. 1994) (noting that all kinds of robbery, other than those listed in subdivision (a), are of the second degree).

3. *Id.* § 213(a)(1)(B) (amended by Chapter 789); *see In re* Mills, 55 Cal. 2d 646, 653, 361 P.2d 15, 19, 12 Cal. Rptr. 483, 487 (1961) (stating that a defendant, who was convicted by a plea of guilty of attempted robbery, had no vested right to serve less than the maximum sentence of 20 years); People v. Rivera, 14 Cal. App. 4th 1743, 1747, 19 Cal. Rptr. 2d 262, 264 (1993) (holding that a sentence of a robbery defendant to an upper term was not an abuse of discretion, given evidence that the defendant played a leadership role, that there was premeditation, and that the defendant had numerous prior convictions of increasing seriousness); People v. Cortez, 103 Cal. App. 3d 491, 496, 163 Cal. Rptr. 1, 3 (1980) (asserting that the means of accomplishing the crime are facts relating to the crime within the meaning of the rule defining circumstances in aggravation); *see also* People v. Harrison, 5 Cal. App. 3d 602, 610-11, 85 Cal. Rptr. 302, 308 (1970) (stating that if a court sentences a defendant for both an attempted robbery and a burglary, the multi-punishment proscriptions of the California Penal Code will be violated since the two crimes constitute an indivisible transaction); People v. Logan, 244 Cal. App. 2d 795, 798, 53 Cal. Rptr. 549, 550 (1966) (holding that where the defendant committed assault with intent to kill for the purpose of perpetrating robbery, the defendant could be sentenced only for robbery, the more serious of the two offenses).

4. CAL. PENAL CODE § 213(a)(1)(A) (amended by Chapter 789); *see id.* (enumerating the locations of the robbery as the following: (1) An inhabited dwelling house; (2) a vessel which is inhabited and designed for habitation; (3) an inhabited floating home; (4) a trailer coach which is inhabited; or (5) the inhabited portions of any other building); *id.* § 213(a)(1)(B) (amended by Chapter 789) (providing that all other cases of robbery of the first degree continue to have the penalty of imprisonment in the state prison for three, four, or six years); *see also id.* § 213(a)(2) (amended by Chapter 789) (providing that robbery of the second degree is punishable by imprisonment in the state prison for two, three, or five years). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Property* §§ 635-47 (2d ed. 1988 & Supp. 1994) (setting forth a brief analysis of case law regarding robbery).

5. *See* CAL. PENAL CODE § 21a (West 1988) (defining an attempt to commit a crime as consisting of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission); *cf.* S.C. CODE ANN. § 44-53-420 (Law Co-op 1984) (providing that any person who attempts or conspires to commit any offense will be fined or imprisoned in the same manner as for the offense planned or attempted, but the fine or imprisonment will not exceed one-half of the punishment prescribed for the offense that was the object of the attempt or conspiracy); VT. STAT. ANN. tit. 13, § 9(c) (Supp. 1993) (declaring that if the offense attempted to be committed is a misdemeanor, a person will be imprisoned, or fined, or both, in an amount not to exceed one-half the maximum penalty for which the offense so attempted to be committed is by law punishable).

6. CAL. PENAL CODE § 664(1) (West 1988); *see id.* (noting that if the crime attempted is willful, deliberate, and premeditated murder, the person guilty of that attempt will be punished by imprisonment in the state prison for life with the possibility of parole, and noting that if the crime attempted is any other one in which the maximum sentence is life imprisonment or death the person guilty of the attempt will be punished by imprisonment in the state prison for a term of five, seven, or nine years). *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 329-64 (1987) (providing a detailed analysis of attempt law, including examinations of the *mens rea* and *actus reus* of criminal attempts); 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* §§ 1620-21 (2d ed. 1989 & Supp. 1994) (discussing some general features of the law of attempt, as well as some exceptions and distinctions).

attempted robbery was punishable by imprisonment in the state prison for a term of sixteen months or two or three years.[7]

Chapter 789 limits the application of this latter penalty provision to attempted second degree robbery.[8] Thus, if a defendant, voluntarily acting in concert with two or more persons, attempts to commit first degree robbery, the act will be punished by imprisonment in the state prison for a term of eighteen months, three years, or four and one-half years.[9] In all other cases of attempted first degree robbery, the penalty will be imprisonment in the state prison for eighteen months, two years, or three years.[10]

INTERPRETIVE COMMENT

Chapter 789 reflects the sad reality that more and more innocent people are being victimized by criminals, and the adjusted penalties for robbery aim to prevent the traumatic experience associated with this crime.[11] In enacting the provisions in this bill, the Legislature remains consistent with its past intent to provide protection for prospective victims of robbery, by creating a strong deterrent to the use of unnecessary force and violence as well as an adequate punishment for the perpetrators.[12]

*Joseph A. Tommasino*

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7. 1986 Cal Stat. ch. 1428, sec. 4 at 5123-24 (enacting CAL. PENAL CODE § 213(b)).

8. CAL. PENAL CODE § 213(b) (amended by Chapter 789).

9. *Id.* § 213(a)(1)(A) (amended by Chapter 789); *see id.* § 664 (West 1988) (discussing attempts).

10. *Id.* § 213(a)(1)(B) (amended by Chapter 10); *see id.* § 664 (West 1988) (delineating punishments for attempts).

11. Katherine Griffin, *Getting Over It: Trauma of Violent Crimes*, HEALTH, Nov. 1993, at 94; *see id.* (reporting that in 1991, national statistics showed that nearly two million violent crimes—murders, rapes, robberies, and assaults—were reported to police, making this country the most violent in the industrialized world, and estimating that 87% of today's 12-year-olds will be the victim of at least one violent crime in their lifetime, and half will be victimized twice).

12. People v. Ramirez, 93 Cal. App. 3d 714, 725, 156 Cal. Rptr. 94, 99 (1979); People v. Carroll, 1 Cal. 3d 581, 584, 463 P.2d 400, 402, 83 Cal. Rptr. 176, 178 (1970); *see id.* (stating that the Legislature increased the penalty for first degree robbery in 1967 to discourage robbers from inflicting great bodily injury on their victims and thereby provide a measure of protection for robbery victims, including unfortunate victims who possess nothing worth stealing).

## Crimes; sex offenders—HIV test result notification to victims of sex crimes

Penal Code § 1202.1 (amended).
AB 2815 (Boland); 1994 STAT. Ch. 121
*(Effective June 30, 1994)*

Existing law requires the courts to order every person convicted of a violation of specified sexual offenses,[1] whether or not a sentence or fine is imposed or probation is granted, to submit to a blood test for evidence of Human Immunodeficiency Virus (HIV).[2] Chapter 121 requires certain juvenile offenders[3] to also submit to this blood test.[4] Existing law further provides that the blood test results are to be delivered to the Department of Justice[5] and the local health officer.[6]

Existing law also provides that a crime victim, in accordance with certain procedures and requirements, may petition a court to issue a search warrant[7] for

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1. *See* CAL. PENAL CODE § 1202.1(e) (amended by Chapter 121) (defining the specified sexual offenses as including any of the following: (1) Rape; (2) unlawful intercourse with a female under the age of 18; (3) rape of a spouse; (4) sodomy; and (5) oral copulation). *See generally* 2 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Sexual Offenses and Other Crimes Against Decency and Morals*, §§ 768-803 (2nd ed. 1988 & Supp. 1993) (describing California sexual offense laws).

2. CAL. PENAL CODE § 1202.1(a) (amended by Chapter 121); *see* HEALTH & SAFETY CODE § 26(b) (West Supp. 1994) (defining Human Immunodeficiency Virus as the etiological virus of AIDS); *see also id.* § 26(c) (West Supp. 1994) (defining "HIV test" as any clinical test, laboratory or otherwise, used to identify HIV, a component of HIV, or antibodies or antigens to HIV); People v. Jillie, 8 Cal. App. 4th 960, 963, 11 Cal. Rptr. 2d 107, 108 (1992) (holding that California Penal Code § 1202.1 does not apply to attempts to commit the enumerated sexual offenses listed in the statute); *cf* ALA. CODE § 22-11A-17 (1994) (providing that all persons sentenced to confinement or imprisonment will be tested for sexually transmitted diseases); ARK. CODE ANN. § 16-82-101 (Michie Supp. 1993) (providing that any person arrested and charged with specific sexual offenses may be required by the court, upon a finding of reasonable cause to believe that the person committed the offense and subject to constitutional limitations, to be tested for the presence of HIV); COLO. REV. STAT. § 18-3-415 (1994) (providing that any adult or juvenile who is bound over for trial for certain sexual offenses will be ordered by the court to submit to a blood test for HIV, which causes acquired immune deficiency syndrome (AIDS)); MISS. CODE ANN. § 99-19-203 (1993) (providing that any person convicted of a sex offense and who is sentenced to imprisonment will be tested for HIV and AIDS upon entering the correctional facility). *See generally* David K. Moody, Note, *AIDS and Rape: The Constitutional Dimensions of Mandatory Testing of Sex Offenders*, 76 CORNELL L. REV. 238 (1990) (discussing the constitutionality of mandatory testing of sex offenders); Bernadette P. Sadler, Comment, *When Rape Victims' Rights Meet Privacy Rights: Mandatory HIV Testing, Striking the Fourth Amendment Balance*, 67 WASH. L. REV. 195 (1992) (describing the constitutional ramifications of mandatory HIV testing); 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 1821(D) (2d. ed. 1988 & Supp. 1994) (describing California's new mandatory AIDS testing).

3. *See* CAL. PENAL CODE § 1202.1 (amended by Chapter 121) (defining certain juvenile offenders as those convicted of or adjudged by the court to be a person described by California Welfare Institutions Code §§ 601 or 602 as provided in California Welfare Institutions Code § 725 by reason of a sexual offense listed in California Penal Code § 1202.1(e)).

4. *Id.*

5. *See* CAL. GOV'T CODE § 12510 (West 1992) (stating that the Department of Justice is headed by the Attorney General).

6. CAL. PENAL CODE § 1202.1(b) (amended by Chapter 121).

7. *See* CAL. PENAL CODE § 1523 (West 1982) (defining search warrant as a written order in the name of the people, signed by a magistrate, directed to a peace officer, and commanding him to search for personal property and to bring it before the magistrate); *see also* Sternberg v. Superior Court, 41 Cal. App. 3d 281, 288,

the purpose of testing the blood of a person charged with a crime for the presence of the HIV virus.[8]

Chapter 121 provides for victim notification of mandatory HIV test results by requiring the prosecutor or the prosecutor's victim witness assistance bureau[9] to refer the victim to the local health officer for counseling,[10] and would require the local health officer, upon the victim's request, to advise the victim and the person who was tested, of the results of the blood test.[11]

## INTERPRETIVE COMMENT

Chapter 121 was enacted for two primary reasons. First, Chapter 121 was enacted in order to guarantee the victim of a sexual assault the right to know the results of an HIV blood test administered to the sex offender.[12] Prior to Chapter 121, the victim of a sexual assault was not guaranteed the right to know the results of the test as the court was under no obligation to require the test's disclosure.[13]

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115 Cal. Rptr. 893, 897 (1974) (holding that evidence of probable cause presented when applying for a search warrant must relate to a point in time in which it is probable that personal property believed to be present on suspect premises has not been removed); People v. Kessey, 250 Cal. App. 2d 669, 670, 58 Cal. Rptr. 625, 626 (1967) (stating that a search warrant may be issued by a magistrate only upon probable cause).

8. CAL. PENAL CODE § 1524.1 (West Supp. 1994).

9. *See id.* §§ 13835-13835.10 (West 1992 & Supp. 1994) (defining the extent and parameters of local assistance centers for victims and witnesses).

10. *See id.* § 1202.1(d)(1) (amended by Chapter 121) (defining counseling as a means to assist the victim in understanding the extent to which the particular circumstances of the crime may or may not have placed the victim at risk of transmission of HIV from the accused, as a means to ensure that the victim understands the limitations and benefits of current tests for HIV, and to assist the victim in determining whether he or she should make the request).

11. *Id.* § 1202.1 (amended by Chapter 121); *Compare id. with* ALA. CODE § 22-11A-17(c) (1994) (providing that, at the request of the victim of certain sexual offenses, the State Health Department must release the results of any tests on the defendant convicted of such offense for the presence of AIDS or HIV) *and* ARK. CODE ANN. § 16-82-101(c) (Michie Supp. 1993) (providing that the results of any HIV tests performed pursuant to this section must immediately be released to the victim and to the defendant) *and* COLO. REV. STAT. § 18-3-415 (1994) (providing that the results of the court ordered HIV test of sexual offenders must be disclosed to the victim of the sexual offense if the victim requests such disclosure) *and* MISS. CODE ANN. § 99-19-203 (1993) (providing that the results of any positive HIV or AIDS test of a convicted sex offender must be reported to the victim(s) of such sex offense).

12. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2815, at 2 (April 12, 1994); *see id.* (stating that sexual assault victims may want information regarding the accused offender's HIV status for two reasons: concern for their own health and concern for the health of their sexual partners). *But see* Paul H. MacDonald, Note, *AIDS, Rape, and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders*, 43 VAND. L. REV. 1607 (1990) (stating that mandatory AIDS testing programs have proven problematic because they often fail to provide for the defendant's interests, which can include such concerns as confidentiality, privacy, and presumption of innocence).

13. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2815, at 2 (April 12, 1994).

Second, Chapter 121 was enacted in order to ensure that the State of California would continually receive federal anti-drug funds.[14] Prior to the passage of this Chapter, the federal government threatened to withhold ten percent of California's criminal justice grant money if California failed to enact legislation guaranteeing to victims the results of HIV blood tests on convicted sex offenders.[15]

*Lisa R. Brenner*

14. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2815, at 3 (June 14, 1994); *see* 42 U.S.C.A. 3756(f) (West Supp. 1994) (describing the federal legislation enacted in 1990, pressuring states to either require the testing of convicted sex offenders at the victim's request or to lose 10% of the federal Anti-Drug Abuse Funding).

15. SENATE JUDICIARY COMMITTEE, COMMITTEE OF AB 2815, at 3 (June 14, 1994); *see id.* at 3 (stating that 10% of California's grant equals approximately $3 million).

**Crimes; sex offenses—spousal rape**

Penal Code §§ 261.6, 264.1, 266c, 273.7, 292, 667.5, 667.6, 667.8, 667.9, 1048, 1127e, 1170.1, 1192.5, 1203.075, 1203.08, 1203.09, 1601, 2933.5, 3057, 12022.8 (amended).
SB 59 (McCorquodale); 1994 STAT. Ch. 1188

Prior law did not include the offense of spousal rape[1] within certain California Penal Code provisions affected by convictions for rape; thus, the subsequent result was that those convicted of non-marital rape were subject to possible sentence enhancements not applicable to persons convicted only of marital rape.[2]

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1. *See* CAL. PENAL CODE § 262(a) (West Supp. 1994) (defining spousal rape as an act of sexual intercourse accomplished against the spouse's will through force, violence, duress, menace, or fear of harm to the spouse or another, or through an intoxicating or controlled substance administered by the perpetrator, or where the victim is unconscious to the nature of the act due to being asleep or unaware of the act); *see also* People v. Hillard, 212 Cal. App. 3d 780, 784, 260 Cal. Rptr. 625, 627 (1989) (finding that California Penal Code § 220, which covers assault with the intent to commit rape, necessarily includes the rape of a spouse as defined in California Penal Code § 262); *cf.* ALA. CODE § 13A-6-61(4) (1994), ARK. CODE ANN. § 5-14-103 (Michie 1993), IND. CODE ANN. § 35-42-4-1 (West Supp. 1994), MICH. COMP. LAWS ANN. § 750.520b (West 1991), NEV. REV. STAT. ANN. § 200.366(1) (Michie 1991), N.J. STAT. ANN. § 2C:14-5(b) (West 1982), OR. REV. STAT. § 163.375 (1993), 18 PA. CONS. STAT. ANN. § 3128 (Supp. 1994), VA. CODE ANN. § 18.2-67.2:1 (Michie Supp. 1994) (exemplifying states that have specifically abrogated the common law marital exemption to rape through legislation); Merton v. State, 500 So. 2d 1301, 1305 (Ala. Crim. App. 1986) (stating that the Equal Protection Clause of the Fourteenth Amendment prohibited the marital exemption within statutes defining rape and therefore any defendant who forcibly compelled sexual intercourse upon any woman was guilty of first degree rape); People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984) (holding that a state law maintaining the marital exemption in the cases of rape was unconstitutional due to equal protection reasons because the distinction between marital and nonmarital rape held no rational basis), *cert. denied sub nom.* Liberta v. New York, 471 U.S. 1020 (1985), and *aff'd sub nom.* Liberta v. Kelly, 839 F.2d 77 (1988), and *cert. denied*, 488 U.S. 832 (1988). *But see* State v. Paolella, 554 A.2d 702, 711 (Conn. 1989) (ruling that a defendant accused of sexual assault upon his wife necessarily lacked criminal culpability due to the marital exemption); State v. Huggins, 665 P.2d 1053, 1055 (Idaho 1983) (asserting that the marital exemption was an affirmative defense that must be raised by the defendant). *See generally* Susan Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A. J. 1088, 1088-1089 (1980) (criticizing the notion of contractual consent given by a wife to her husband to have forceful sex with her and discussing generally the origins of the common law spousal exemption to rape); Sue Blay-Coshen & Dina L. Coster, *Marital Rape in California: For Better or For Worse*, 8 SAN FERN. V. L. REV. 239, 239-41 (1980) (discussing the historical developments of the marital exemption for rape and modern states which abrogate the exemption); Anne L. Buckborough, *Family Law: Recent Developments in the Law of Marital Rape*, 1989 ANN. SURV. AM. L. 343 (describing modern statutory reform, and theories underlying the traditional marital exemption of rape); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1255 (1986) (discussing marital rape, generally); Review of Selected 1979 Legislation, *Crimes; Rape—Spousal Rape*, 11 PAC. L.J. 259, 409 (1980) (discussing the enactment of the crime of spousal rape in the California Penal Code); Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R. 4TH 105, 107 (1983) (analyzing both state and federal cases which have decided upon whether a husband can be convicted for the rape of his wife).

2. 1990 Cal. Legis. Serv. ch. 271, sec. 1, at 1249 (amending CAL. PENAL CODE § 261.6); 1982 Cal. Stat. ch. 1111, sec. 4, at 4025 (amending CAL. PENAL CODE § 264.1); 1992 Cal. Legis. Serv. ch. 224, sec. 2, at 826 (amending CAL. PENAL CODE § 266c); 1988 Cal. Stat. ch. 840, sec. 1, at 2741-42 (enacting CAL. PENAL CODE § 273.7); 1984 Cal. Stat. ch. 1202, sec. 1, at 4123-24 (enacting CAL. PENAL CODE § 292); 1993 Cal. Legis. Serv. ch. 611, sec. 11, at 2863-64 (amending CAL. PENAL CODE § 667.5); 1993 Cal. Legis. Serv. ch. 127,

sec. 1, at 1132-33 (amending CAL. PENAL CODE § 667.6); 1986 Cal. Stat. ch. 249, sec. 8, at 1316 (amending CAL. PENAL CODE § 667.8); 1993 Cal. Legis. Serv. ch. 611, sec. 13, at 2865-66 (amending CAL. PENAL CODE § 667.9); 1986 Cal. Stat. ch. 588, sec. 1, at 2057-58 (amending CAL. PENAL CODE § 1048); 1974 Cal. Stat. ch. 1092, sec. 1, at 2320 (enacting CAL. PENAL CODE § 1127e); 1993 Cal. Legis. Serv. ch. 611, sec. 17.98, at 2881-83 (amending CAL. PENAL CODE § 1170.1); 1979 Cal. Stat. ch. 944, sec. 13, at 3261 (amending CAL. PENAL CODE § 1192.5); 1993 Cal. Legis. Serv. ch. 611, sec. 23, at 2897-98 (amending CAL. PENAL CODE § 1203.075); 1993 Cal. Legis. Serv. ch. 611, sec. 24, at 2898 (amending CAL. PENAL CODE § 1203.08); 1993 Cal. Legis. Serv. ch. 611, sec. 25, at 2898-99 (amending CAL. PENAL CODE § 1203.09); 1993 Cal. Legis. Serv. ch. 611, sec. 26, at 2899 (amending CAL. PENAL CODE § 1601); 1990 Cal. Legis. Serv. ch. 1700, sec. 3, at 6900-01 (enacting CAL. PENAL CODE § 2933.5); 1993 Cal. Legis. Serv. ch. 611, sec. 27, at 2899-2900 (amending CAL. PENAL CODE § 3057); 1986 Cal. Stat. ch. 1299, sec. 15, at 4611 (amending CAL. PENAL CODE § 12022.8); *see* CAL. PENAL CODE § 261.6 (amended by Chapter 1188) (defining consent in prosecutions of certain sex offenses in which consent is at issue as positive cooperation demonstrated through a person's actions or attitude which indicate that person's free will); *id.* § 264.1 (amended by Chapter 1188) (punishing through prison sentences of five, seven, or nine years any individual who acts in concert with another by force or violence to rape or penetrate another person's anal or genital openings with a foreign object); *id.* § 266c (amended by Chapter 1188) (forbidding the fraudulent inducement or falsely procured consent to sexual intercourse or other sexual activities, including anal or genital penetration by a foreign object, oral copulation, and sodomy); *id.* § 273.7 (amended by Chapter 1188) (describing what constitutes a domestic violence shelter and making the malicious disclosure or publication of the location of any domestic violence shelter a misdemeanor); *id.* § 292 (amended by Chapter 1188) (stating that for the purposes of Article I, § 12(b)-(c) of the California Constitution, regarding bailment eligibility, the sections listed are intended to constitute a violent felony offense or an offense with the threat of great bodily harm); *see also* CAL. PENAL CODE § 667.5(a) (amended by Chapter 1188) (providing that the defendant will be subject to a three-year sentence enhancement for any new conviction if both the current and previous offenses were one of enumerated violent felonies as listed in subsection (c)); *id.* § 667.6 (amended by Chapter 1188) (prescribing one-to-ten year sentence enhancements for those found guilty under specified circumstances of certain violent or sexual offenses); *id.* § 667.8 (amended by Chapter 1188) (permitting an additional three-year sentence enhancement for persons convicted of specified sexual crimes who kidnapped the victim for the purpose of facilitating the sexual offense); *id.* § 667.9(a)-(b) (amended by Chapter 1188) (establishing a one-year sentence enhancement for those convicted of new specific crimes, and a two-year enhancement for a subsequent conviction of one of the enumerated offenses, for persons who knowingly committed one of the listed offenses against a person over 65 or under 14 years of age, a paraplegic or quadriplegic, or a blind person); *id.* § 1048(b) (amended by Chapter 1188) (mandating that prosecutions involving victims of certain forceful or violent sexual offenses have trial precedence over other criminal proceedings); *id.* § 1127e (amended by Chapter 1188) (dictating that the descriptive term "unchaste character" may not be used in any criminal proceeding involving a defendant charged with rape or unlawful intercourse with a person under 18 years of age); *id.* § 1170.1 (amended by Chapter 1188) (providing that for a person convicted of two or more felonies with a consecutive sentence imposed, the aggregate term of imprisonment permitted will be the total of the principal, subordinate, and additional sentenced terms, but excluding sentences given for certain enumerated sex offenses which are imposed consecutively and separately to any other terms of imprisonment); *id.* § 1192.5 (amended by Chapter 1188) (allowing a defendant entering a plea of guilty or nolo contendere to specify the punishment to be imposed, provided the felony charge being plead to is not for a specified violent sex offense); *id.* § 1203.075 (amended by Chapter 1188) (disallowing probation or a suspended sentence for persons convicted of specified violent crimes and who intentionally inflict great bodily injury on another during the commission of the violent felony); *id.* § 1203.08 (amended by Chapter 1188) (restricting probation and suspended sentence options for persons convicted of a designated felony, who also have two prior convictions of any of the designated felonies within the previous 10 years); *id.* § 1203.09 (amended by Chapter 1188) (providing that persons convicted of certain offenses will not have probation or a suspended sentence granted if in the commission of their crime they inflicted great bodily injury upon an individual known to them to be 60 years of age or older, a quadriplegic, paraplegic, or other person restricted to a wheelchair, or a blind person); *id.* § 1601 (amended by Chapter 1188) (confining persons found not guilty of specified violent offenses by reason of insanity to a minimum of 180 days in a state hospital or other facility before outpatient status can be granted); *id.* § 2933.5 (amended by Chapter 1188) (preventing the earning of credit on terms of imprisonment by persons found guilty of certain felony offenses and who have been convicted at least twice previously and served two or more terms of imprisonment); *id.* § 3057 (amended by Chapter 1188) (directing that persons confined only for revocation of parole will not serve more than 12 months, with that term being subject to reduction by specified worktime

Chapter 1188 includes the offense of spousal rape within enumerated sections of the California Penal Code which deal with other sexual and violent crimes.[3]

INTERPRETIVE COMMENT

Chapter 1188 was enacted to change various provisions in the law so that the crime of spousal rape would be addressed in a similar manner as non-spousal rape and other violent felonies.[4] Supporters of Chapter 1188 maintain that statutes that included non-marital rape provisions but ignored spousal rape needed to be rewritten to ensure that the offense of spousal rape was treated just as seriously as other sexual crimes.[5] There was no reported opposition to Chapter 1188.[6]

*Sean P. Lafferty*

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credits, but excluding certain parolees from earning such credits); *id.* § 12022.8 (amended by Chapter 1188) (ordering a sentence enhancement of five years for each violation for persons convicted of specified crimes who commit great bodily injury on their victims).

3. CAL. PENAL CODE §§ 261.6, 264.1, 266c, 273.7, 292, 667.5, 667.6, 667.8, 667.9, 1048, 1127e, 1170.1, 1192.5, 1203.075, 1203.08, 1203.09, 1601, 2933.5, 3057, 12022.8 (amended by Chapter 1188); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 59, at 5 (June 21, 1994) (stating that SB 59 is intended to eliminate marital exemptions for sexual assault offenses).

4. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 59, at 5 (June 21, 1994); *see id.* (noting that without the passage of SB 59, the Legislature would be impliedly suggesting that spousal rape is not a serious sexual assault); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 59, at 1 (May 6, 1993) (stating that SB 59 will make spousal rape similar in penalty to traditional rape within California law).

5. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 59, at 7 (June 21, 1994); *see id.* (citing support for SB 59 from a number of groups, including Women Escaping a Violent Environment (WEAVE), the Commission on the Status of Women, and the Criminal Law Executive Committee of the State Bar Criminal Law Section); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 59, at 3 (May 6, 1993) (noting support from California NOW, Inc., California Alliance Against Domestic Violence, and the California Correctional Peace Officers Association, among others, and stating that the reason for the spousal rape omission from existing law is either due to Legislative indifference from not treating spousal rape seriously, or because of the archaic perception that spousal rape is not necessarily rape as traditionally defined).

6. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 59, at 8 (June 21, 1994); *see id.* (reporting that there was no reported opposition to SB 59 on file). *But See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 59, at 3 (May 6, 1993) (noting that at one time the California Public Defenders Association opposed SB 59 due to concern over possible sentence enhancements for spousal rape which might make the offense more severely punished than other sexual crimes).

**Crimes; sexual exploitation of children**

Penal Code §§ 311.2, 311.3, 311.4, 311.11, 312.3 (amended).
AB 927 (Honeycutt); 1994 STAT. Ch. 55

Under existing law, a person who knowingly[1] sends or brings any obscene matter[2] into the state for sale or distribution, or possesses, prepares, publishes, or prints obscene matter with the intent to distribute[3] or exhibit[4] it to others commits a misdemeanor on the first offense.[5] Under existing law, it is a felony for a person to knowingly send or bring any obscene matter into the state for sale or distribution, or to possess, prepare, publish, develop, duplicate, or print obscene matter for a commercial purpose, knowing that the matter depicts a child under the age of eighteen involved in sexual conduct.[6] Chapter 55 adds production to the list of proscribed conduct.[7]

Prior law prohibited sending or bringing into the state any material that depicted a child under the age of seventeen involved in sexual conduct for sale or distribution, or possessing, preparing, publishing, developing, duplicating, or printing such material with the intent to distribute or exhibit it to others.[8] Existing law imposes higher penalties if such material is shown to a child under the age of

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1. *See* CAL. PENAL CODE § 311(e) (West Supp. 1994) (defining knowingly as being aware of the character of the matter or conduct); People v. Pinkus, 256 Cal. App. 2d Supp. 941, 948-49, 63 Cal. Rptr. 680, 686 (1967) (interpreting the statutory definition of knowingly to mean the defendant was aware the matter was obscene).

2. *See* CAL. PENAL CODE § 311(a) (West Supp. 1994) (defining obscene matter as that which under statewide community standards is deemed to appeal to prurient interests and offensively depicts sexual conduct while lacking serious artistic, literary, political, or scientific value); *see also* Miller v. California, 413 U.S. 15, 24 (1973) (defining obscene material subject to state regulation as that which appeals to prurient interests and depicts offensive sexual conduct without serious literary, artistic, political, or scientific value).

3. *See* CAL. PENAL CODE § 311(d) (West Supp. 1994) (defining distribute).

4. *See id.* § 311(f) (West Supp. 1994) (defining exhibit).

5. *Id.* § 311.2 (a) (amended by Chapter 55); *see id.* (providing that in addition to the punishment authorized in California Penal Code § 311.9, a court may impose a fine of as much as $50,000 against a person previously convicted under California Penal Code § 311.2).

6. *Id.* § 311.2(b) (amended by Chapter 55); *see id.* § 311.4(d) (amended by Chapter 55) (defining sexual conduct); *cf.* ARIZ. REV. STAT. ANN. § 13-3553 (1989) (defining sexual exploitation of a minor); FLA. STAT. § 827.071 (West Supp. 1994) (describing what constituted sexual performance by a child and providing penalties); N.Y. PENAL LAW § 263.00 (McKinney 1989) (providing definitions for crimes related to child sex performances as proscribed in the article, where the child's age is less than 16).

7. CAL. PENAL CODE § 311.2(a)-(b) (amended by Chapter 55); *cf.* 18 U.S.C.A. § 2256(3) (West Supp. 1994) (defining producing as producing, directing, manufacturing, issuing, publishing, or advertising).

8. 1988 Cal. Stat. ch. 1392, sec. 3, at 4708-09 (amending CAL. PENAL CODE § 311.2); *see* CAL. PENAL CODE § 311.2(c)-(d) (amended by Chapter 55) (specifying that no requirement of proof of commercial purpose or obscenity is necessary); New York v. Ferber, 458 U.S. 747, 756 (1982) (noting that states are entitled to more flexibility in legislation against child pornography). In *Ferber*, the court held that child pornography is outside the protection of the First Amendment. *Id.* at 763.

eighteen.[9] Chapter 55 adds production to the list of proscribed conduct and raises the age of the child depicted in the material to eighteen.[10]

Prior law prohibited the sexual exploitation of a child by developing, duplicating, printing, or exchanging any film or photographic material of a child under the age of fourteen; the hiring, permitting, persuading, or coercing of a child under the age of seventeen to pose or model in a film or performance involving sexual conduct; and the knowing possession or control of any matter depicting a child under the age of fourteen engaging in or simulating sexual conduct.[11] Prior law also made matter in the possession of a city, county, or state official or agency which depicted a child under the age of seventeen engaged in or simulating sexual conduct subject to forfeiture.[12] Chapter 55 raises the age of the child to eighteen for all of the aforementioned provisions.[13]

## INTERPRETIVE COMMENT

Chapter 55 was enacted to broaden child pornography and exploitation laws by uniformly encompassing children under the age of eighteen.[14] This change is consistent with federal statutes protecting minors against sexual exploitation.[15] By raising the age to eighteen years, enforcement problems related to the difficulty

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9. CAL. PENAL CODE § 311.2(d) (amended by Chapter 55); *compare id.* (providing that a person found guilty of showing material that depicts a child under 18 involved in sexual conduct to a minor is guilty of a felony) *with id.* § 311.2(c) (amended by Chapter 55) (making it a misdemeanor to show material depicting a child under 18 involved in sexual conduct to an adult).

10. *Id.* § 311.2(c)-(d) (amended by Chapter 55).

11. 1981 Cal. Stat. ch. 1056, sec. 1, at 4080-81 (enacting CAL. PENAL CODE § 311.3); 1987 Cal. Stat. ch. 1394, sec. 5, at 5090-91 (amending CAL. PENAL CODE § 311.4); 1989 Cal. Stat. ch. 1180, sec. 2, at 4568 (enacting CAL. PENAL CODE § 311.11); *see In re* Duncan, 189 Cal. App. 3d 1348, 1360, 234 Cal. Rptr. 877, 884-85, (holding that California Penal Code § 311.3 is not contrary to the constitutional rights of free speech and expression and is not overbroad nor invalid), *cert. denied*, Duncan v. California, 484 U.S. 985 (1987); *id.* at 1358, 234 Cal. Rptr. at 883 (stating that the purpose of the section is to protect children, who are incapable of consenting, from sexual abuse and exploitation by those who would pose them obscenely and create a permanent record of the acts). *See generally* Joseph Zuber, Review of Selected 1989 California Legislation, *Crimes, Possession of Child Pornography*, 21 PAC. L. J. 333, 429 (1990) (discussing California Penal Code § 311.11); Review of Selected 1981 California Legislation, *Crimes, Sexual Exploitation of Children*, 13 PAC. L. J. 513, 640 (1982) (discussing California Penal Code §§ 311.3, 311.4).

12. 1985 Cal. Stat. ch. 880, sec. 1, at 2826-28 (adding CAL. PENAL CODE § 312.3).

13. CAL. PENAL CODE §§ 311.2(c)-(d), 311.3(a), 311.4(b)-(c), (e), 311.11(a), (d), 312.3(a), (i) (amended by Chapter 55).

14. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 927, at 3 (Mar. 15, 1994); *see* Richard Procida, *Legislature Should Lower* [sic] *Age in State Law*, L.A. DAILY J., Jan. 6, 1994, at 6 (advocating raising the age of felony child sexual exploitation from 14 to 18 and supporting tougher penalties for sexual exploitation of children).

15. *See* 18 U.S.C.A. §§ 2251-2258 (West Supp. 1994) (establishing federal rules against child pornography); United States v. Reedy, 845 F.2d 239, 241 (10th Cir. 1988) (finding that the federal statute raising the age of protected minors to 18 was a minor change not subjecting the statute to an overbreadth challenge), *cert. denied*, Reedy v. United States, 489 U.S. 1055 (1989); *see also* 18 U.S.C.A. § 2256(1) (West Supp. 1994) (defining minors as persons under the age of 18 years).

of determining whether or not a child is under age should be minimized.[16] Under existing law, the statutes regarding sexual exploitation of children generally require knowledge of the child's age for conviction.[17] However, Chapter 55 raised the age to eighteen without ensuring that each affected provision was consistent with regard to the requirement that the perpetrator know the child was under eighteen.[18]

Chapter 55 explicitly proscribes production of obscene matter and child pornography in the state.[19] Although prior law did not specifically proscribe the production of such matter, case law has interpreted prior law to include such a prohibition.[20]

*Molly K. Mosley*

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16. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 927, at 4 (Mar. 15, 1994) (stating that 18 years of age is a better standard because children develop at different rates); *see also* United States v. Freeman, 808 F.2d 1290, 1293 (8th Cir. 1987) (holding that since child pornography is not constitutionally protected, the court need find only that the definition of a minor had a reasonable relationship to a legitimate government interest), *cert. denied*, 480 U.S. 922 (1987). In *Freeman*, the court found the definition did show a rational relationship to the government's interest by improving enforcement. *Id.* at 1293. When a child was unavailable to testify as to his age, the offense could not be proved by the materials alone unless a child had not yet entered puberty; by raising the age to 18, the statutes could be enforced when the child did not appear to be an adult. *Id. But cf.* Lawrence A. Stanley, *The Child-Pornography Myth*, PLAYBOY, Sept. 1988, at 41 (claiming that child pornography never has been a lucrative business and did not justify the extreme measures taken against it, especially through aggressive mail-order sting operations carried out by the U.S. Postal Service and U.S. Customs; the article states that a vast commercial network of pedophiles is a myth, the real problem being child abuse by family members who prey on children merely because they are available and defenseless).

17. *See* CAL. PENAL CODE §§ 311.2(b)-(d), 311.4(a)-(c), 311.11(a) (amended by Chapter 55) (requiring that the defendant knows the child was under the age specified).

18. *See id.* § 311.3(a) (amended by Chapter 55) (requiring knowing conduct but making no specific statement that the defendant must know the age of the child involved, which was 14 prior to amendment by Chapter 55). *Compare id. with* CAL. PENAL CODE §§ 311.2(b)-(d), 311.4(a)-(c), 311.11(a) (amended by Chapter 55) (requiring both knowing conduct and knowledge of the age). *See generally* People v. Olsen, 36 Cal. 3d 638, 646-47, 685 P.2d 52, 57-58, 205 Cal. Rptr. 492, 497-98 (1984) (construing the lack of *mens rea* regarding age in California Penal Code § 288 and determining that reasonable mistake as to the victim's age is not a defense to a charge of lewd or lascivious conduct with a child under the age of 14 years; the court declared that persons under the age of 14 are in need of special protection); *id.* at 648, 685 P.2d at 58, 205 Cal. Rptr. at 498 (stating that the Legislature has determined that those who commit sexual offenses on children under 14 should be punished more severely than those who commit such offenses on children under the age of 18).

19. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 927, at 2-3 (Mar. 15, 1994).

20. *See* People v. Cantrell, 7 Cal. App. 4th 523, 540, 9 Cal. Rptr. 2d 188, 198 (1992) (interpreting California Penal Code §§ 311.2, 311.3, 311.4, 311.11: "[u]nder them, it is no longer only the distribution but the *production*, reproduction and possession of such material which is proscribed") (emphasis added).

**Crimes; threats to public officials**

Penal Code § 12021.3 (new); §§ 76, 602.1 (amended).
SB 1463 (Petris); 1994 STAT. Ch. 820

Under existing law, a person who knowingly and willingly threatens to take the life of, or inflict great bodily injury upon, an elected official, exempt employee of the Governor, a judge, or the immediate family of any such person, and who has the apparent ability to carry out such a threat is guilty of a crime.[1] Chapter 820 extends the provision to include all elected officials, including public defenders, county clerks, as well as the immediate family members and staff of all specified persons.[2]

Additionally, existing law makes it unlawful to intentionally interfere with a public business by harassing its operators, owners, or customers after previously being asked to leave.[3] Chapter 820 makes it a crime to intentionally interfere with a public agency open to the public by harassing its employees or clients and refusing to leave when requested.[4]

Lastly, existing law makes it a crime for any person convicted of a felony or a specified misdemeanor[5] to possess within ten years of the conviction, own, or have under one's control a firearm.[6] Chapter 820 includes a violation of section 76 of the California Penal Code[7] as one of the specified misdemeanors for which, if convicted, within ten years after conviction, a person cannot own, possess, or have under his or her control a firearm.[8]

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1. CAL. PENAL CODE § 76(a) (amended by Chapter 820); *see id.* § 76(a)(1) (amended by Chapter 820) (providing that the punishment for the first offense is a fine of up to $5000 and/or imprisonment in the state or county jail for not more than one year); *id.* § 76(a)(2) (amended by Chapter 820) (mandating that a subsequent conviction be punished by imprisonment in the state prison); *id.* § 76(c)(1) (amended by Chapter 820) (specifying that the apparent ability to carry out the threat occurs when an incarcerated prisoner can carry the threat to fruition at some future date); *id.* § 76(d) (amended by Chapter 820) (mandating that the threats against staff members relate to their direct duties as a staff member).

2. *Id.* § 76(c)(3) (amended by Chapter 820); *see id.* (defining immediate family as a spouse, parent, child, or anyone who on a regular basis lives at the residence).

3. *Id.* § 602(p) (West Supp. 1994); *see id.* § 602 (West Supp. 1994) (providing that a violation of its provisions is a misdemeanor).

4. *Id.* § 602.1(b) (amended by Chapter 820); *see id.* (declaring such an interference is a misdemeanor punishable by imprisonment in the county jail for not more than 90 days and/or a fine of up to $400).

5. *See id.* § 12001.6 (West Supp. 1994) (listing the applicable misdemeanors as involving the violent use of a firearm, or force is likely to produce great bodily injury including assault with a deadly weapon, shooting at an inhabited dwelling house, and drawing, exhibiting, or using a firearm or deadly weapon).

6. *Id.* § 12021(c)(1) (West Supp. 1994); *see id.* (declaring that a violation of this section is punishable by imprisonment in state or county jail for not more than one year and/or a fine of up to $1000); *see also* People v. Neese, 272 Cal. App. 2d 235, 245, 77 Cal. Rptr. 314, 321 (1969) (stating that California Penal Code § 12021 does not require any specific criminal intent); *id.* at 245, 77 Cal. Rptr. at 322 (holding that a person convicted of firearm possession does not need to have exclusive possession of a weapon); State v. Day, 410 So. 2d 741, 743 (La. 1982) (holding that constructive possession is sufficient for conviction).

7. *See supra* note 1 and accompanying text (describing the changes in California Penal Code § 76).

8. CAL. PENAL CODE § 12021(c)(1) (West Supp. 1994).

INTERPRETIVE COMMENT

Chapter 820 was introduced in order to address the growing problem of threats and violence against elected officials and their staffs.[9] By including these members in the protected class of individuals, it is the Legislature's intent to decrease the occurrence of violent attacks on public servants.[10]

*Kevin T. Collins*

**Crimes; transportation to homeless shelters**

Penal Code § 647a (new).
SB 2083 (Campbell); 1994 STAT. Ch. 1102

Prior law provided that any person who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself or herself or to account for his or her presence when requested by any peace officer,[1] was guilty of the misdemeanor known as disorderly conduct, if the surrounding circumstances indicated to a reasonable person that identification was necessary to ensure the public safety.[2]

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9. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1463, at 3 (June 14, 1994); *see id.* (stating that under increasing budget restraints elected officials have had to make many difficult decisions that cut jobs and programs, often leading the people who are negatively affected to act out, either verbally or physically, against elected officials or their families in order to vent frustration); *id.* (stating that according to the Centers for Disease Control and Prevention, homicide is the leading cause of death for females in the workplace); *id.* (stating that 68% of all attacks in the workplace occur from people who are clients, patients, and strangers to the victims); *see* Ann Bancroft, *Warning on Tax Extremists After Clerk Attacked,* S.F. CHRON., Feb. 4, 1994, at A20 (describing the attack on a county clerk who was stalked, threatened, and finally beaten by an extremist tax protester); Victoria Benning, *Torkildsen Downplays Death Threat; Call Demands 'Positive' Vote on Crime Bill,* BOSTON GLOBE, Aug. 21, 1994 (depicting how the members of Congress are regularly the targets of intimidation by anonymous threats).

10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1463, at 3 (June 14, 1994).

1. *See* CAL. PENAL CODE §§ 830-832.9 (West 1985 & Supp. 1994) (defining peace officer).

2. *Id.* § 647(e) (West Supp. 1994). California Penal Code § 647(e) has been neither amended nor repealed since being declared unconstitutional in Kolender v. Lawson, 461 U.S. 352 (1983). The Supreme Court case held that the statute, as drafted and as construed by the state court, is unconstitutionally vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment for failing to clarify what is contemplated by the requirement that a suspected vagrant provide a "credible and reliable" identification. *Kolender,* 461 U.S. at 358; *see id.* (reasoning that the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest); *id.* at 358 (noting that the statute in question implicated consideration of the constitutional right to freedom of movement); *see also* U.S. CONST. amend. XIV, § 1 (declaring that no state shall deprive a person of life, liberty, or property, without due process of law).

Chapter 1102 provides that specified peace officers[3] may transport any person, as quickly as is feasible, to the nearest homeless shelter, if the officer inquires whether the person desires the transportation and the person does not object to the transportation.[4] Chapter 1102 also states that any officer exercising due care and precaution will not be liable for any damages or injury incurred during transportation.[5] Notwithstanding any other provision of law, Chapter 1102 will become operative in a county only if the board of supervisors adopts the

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3. *See* CAL. PENAL CODE § 647a(a) (enacted by Chapter 1102) (defining peace officer as those persons described in California Penal Code §§ 830.1(a), 830.31, 830.32, or 830.33); *id.* § 830.1(a) (West Supp. 1994) (defining peace officer as any county sheriff, undersheriff, or deputy sheriff, employed in that capacity; any city chief of police, employed in that capacity; any police officer, employed in that capacity and appointed by the chief of police or the chief executive of the agency of a city; any chief of police, or police officer of a district (including police officers of the San Diego Unified Port District Harbor Police) authorized by statute to maintain a police department; any marshal or deputy marshal of a municipal court; any constable or deputy constable, employed in that capacity, of a judicial district; any port warden or special officer of the Harbor Department of the City of Los Angeles; or any inspector or investigator employed in that capacity in the office of a district attorney); *id.* § 830.31 (West Supp. 1994) (denoting peace officers as the following: (1) A safety police officer of the County of Los Angeles, if the primary duty of the officer is the enforcement of the law in or about properties owned, operated, or administered by his or her employing agency or when performing necessary duties with respect to patrons, employees, and properties of his or her employing agency; (2) a person designated by a local agency as a park ranger and regularly employed in that capacity, if the primary duty of the officer is the protection of the park and other property of the agency and the preservation of the peace therein; (3) a security officer of the Department of General Services of the City of Los Angeles designated by the general manager of the department, if the primary duty of the officer is the enforcement of the law in or about properties owned, operated, or administered by his or her employing agency or when performing necessary duties with respect to patrons, employees, and properties of his or her employing agency; and (4) a housing authority patrol officer employed by the housing authority of a city, district, county, or city and county, or employed by the police department of a city and county, if the primary duty of the officer is the enforcement of the law in or about properties owned, operated, or administered by his or her employing agency or when performing necessary duties with respect to patrons, employees, and properties of his or her employing agency); *id.* § 830.32 (West Supp. 1994) (listing as peace officers the following people: (1) Members of a community college police department, if the primary duty of the peace officer is the enforcement of the law; and (2) persons employed as members of a police department of a school district, if the primary duty of the peace officer is the enforcement of the law); *id.* § 830.33 (West Supp. 1994) (listing as peace officers the following: (1) Members of the San Francisco Bay Area Rapid Transit District Police Department, if the primary duty of the peace officer is the enforcement of the law, in or about properties owned, operated, or administered by the district or when performing necessary duties with respect to patrons, employees, and properties of the district; (2) harbor or port police regularly employed and paid in that capacity by a county, city, or district other than peace officers authorized under California Penal Code § 830.1, if the primary duty of the peace officer is the enforcement of the law in or about the properties owned, operated, or administered by the harbor or port or when performing necessary duties with respect to patrons, employees, and properties of the harbor or port; (3) transit police officers or peace officers of a county, city, transit development board, or district, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, or administered by the employing agency or when performing necessary duties with respect to patrons, employees, and properties of the employing agency; (4) any person regularly employed as an airport law enforcement officer by a city, county, or district operating the airport or by a joint powers agency operating the airport, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, and administered by the employing agency or when performing necessary duties with respect to patrons, employees, and properties of the employing agency; and (5) any railroad police officer commissioned by the Governor, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, or administered by the employing agency or when performing necessary duties with respect to patrons, employees, and properties of the employing agency).

4. *Id.* § 647a(a) (enacted by Chapter 1102).

5. *Id.*

provisions of this section by ordinance, and the ordinance includes a provision requiring peace officers to determine the availability of space at the nearest homeless shelter prior to transporting any person.[6]

## COMMENT

There are increasing numbers of homeless persons on the streets of California, and many of these persons are unaware of the availability or location of shelters or social services.[7] Chapter 1102 is needed to provide statutory authority for police officers to transport homeless persons to the nearest homeless shelter.[8] While some shelters such as armories provide few amenities, the conditions in these shelters are still preferable to sleeping on the street and facing adverse weather conditions.[9]

However, Chapter 1102 may create a dilemma for the peace officer who transports a homeless person to a shelter and subsequently discovers that there is no room at the shelter for that person; although Chapter 1102 requires the peace officer to determine the availability of space at the shelter prior to transporting the person, Chapter 1102 is silent on whether the peace officer must try subsequent shelters or simply let the homeless person return to the street if a shelter has reached full capacity.[10]

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6. *Id.* § 647a(b) (enacted by Chapter 1102).

7. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 2083, at 1 (July 5, 1994); *see* Lucie White, *Representing "The Real Deal,"* 45 U. MIAMI L. REV. 271, 280-81 (1991) (stating that the rise in homelessness in the last decade has been associated with four broad social trends: (1) The demolition of low-rent housing, especially single room occupancy units in urban areas; (2) the defunding of federal housing and income subsidy programs; (3) the de-institutionalization of the mentally ill, followed in the 1980's by a disruption of federal subsidies for the mentally disabled; and (4) the de-industrialization of the economy).

8. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2083, at 2 (Apr. 4, 1994); *see* Donald E. Baker, Comment, *"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417, 424 (1991) (stating that many cities have responded aggressively to homeless individuals living in their streets and parks by arresting them or by trying to relocate them elsewhere, but other cities have adopted a policy of "benign neglect" which tolerates homeless persons on the streets as an unfortunate fact of urban life); *id.* at 449 (arguing that homeless persons should be able to assert the criminal law doctrines of justification and excuse as defenses to their "crimes").

9. David A. Sylvester, *Shelter "Emergency" Is Perpetual—Wilson Gets 2 Bills to Extend Use of Armories by Homeless*, S.F. CHRON., Sept. 6, 1994, at A1; *see id.* (stating that in San Francisco or Alameda counties, where armories are not used to shelter the homeless, a vast network of churches and nonprofit agencies have set up emergency beds for the great numbers of urban homeless). *But see id.* (noting that in other areas, alternatives to armories have been thwarted because of politics, neighborhood opposition, a lack of money, and the difficulty of finding appropriate buildings).

10. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 2083, at 2 (July 5, 1994); *see id.* (discussing a letter from the Orange County Homeless Issues coordinator which states the following: "It is not uncommon for police officers to transport homeless persons to the armories only to find that we are at capacity. Although we try not to turn people away, this could present a problem for shelter providers that have limited bed space, or that might serve only target groups."); *id.* (noting that the actions endorsed by SB 2083 were apparently practiced to some extent in the past and were not universally welcomed by those who provided services to the homeless); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2083, at 2 (April 4, 1994) (suggesting that efforts to transport a homeless person to a shelter may only displace another homeless person who might have taken that place in the shelter).

More importantly, Chapter 1102 might be utilized as a vagrancy statute and might have the effect of impinging on constitutional freedoms, since the new law may, in practice, authorize and encourage police to "round up" or "pick up" the homeless in the absence of any evidence or even suspicion of criminal conduct.[11] Under the Fourth Amendment, the police may detain an individual for the purpose of asking investigative questions only if they have reasonable suspicion that the individual has committed or is about to commit a crime.[12] However, vagrancy statutes by their very nature invite police officers and prosecutors to harass or punish persons who are unacceptable to them, or to single out persons for arrest based on race, sex, or political views.[13] The United States Supreme Court has stated that arresting a person on mere suspicion is foreign to our system of justice, even when the arrest is for past criminality; future criminality is unfortunately the common justification for the presence of vagrancy statutes.[14]

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11. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 2083, at 2 (June 15, 1994); *see id.* (lamenting the fact that SB 2083 does not state that a person who originally agreed to be transported may withdraw his or her consent; such a provision would imply that a person could not be transported and necessarily detained against his or her will, thus dispelling any notions of coerced transportation).

12. Terry v. Ohio, 392 U.S. 1, 30 (1968); *see id.* (holding that a police officer is entitled, for the protection of himself and others in the area, to conduct a carefully limited search of the outer clothing of suspicious persons in an attempt to discover weapons which might be used to assault him, but suggesting that in order for such a search to be valid, certain conditions must be met: (1) The police officer must observe unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; (2) in the course of investigating this behavior he must identify himself as a policeman and make reasonable inquiries; and (3) nothing in the initial stages of the encounter must serve to dispel his reasonable fear for his own or others' safety); *see also* U.S. CONST. amend. IV (declaring that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...").

13. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 29-30 (1987); *see* Papachristou v. City of Jacksonville, 405 U.S. 156, 156 & n.1 (1972) (involving eight defendants who were convicted in a Florida municipal court for violating a Jacksonville, Florida, vagrancy ordinance that targeted such types of people as beggars, common gamblers, habitual loafers, and people who were wandering or strolling around from place to place without any lawful purpose or object); *id.* at 162 (holding that the vagrancy statute involved in that case was void for vagueness for two reasons: (1) It failed to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden by the statute; and (2) it encouraged arbitrary and erratic arrests and convictions). The State of Florida also had a vagrancy statute at the time which read similarly to the Jacksonville ordinance, but the state's statutory section was declared unconstitutionally overbroad. Lazarus v. Faircloth, 301 F. Supp. 266, 272 (S.D. Fla. 1969). *See id.* (declaring that the statute draws no distinction between conduct that is calculated to harm and that which is essentially innocent, and all loitering or idling on the streets of a city, even though habitual, is not necessarily detrimental to the public welfare, nor is it under all circumstances an interference with travel upon those streets (quoting Hawaii v. Anduha, 48 F.2d 171, 172 (1969))). *See generally* I.J. Schiffres, Annotation, *Validity of Loitering Statutes and Ordinances*, 25 A.L.R. 3D 836, 836-48 (1969) (focusing on various aspects of loitering statutes, such as their ability to withstand challenges for vagueness and challenges for exceeding the police power and explaining how vagrants as a class have been defined by such descriptions as "persons without employment," "persons who loiter, wander, or roam," "persons who associate with undesirables," and "persons who are lewd or dissolute"); M.S. Galinsky, Annotation, *Vagueness as Invalidating Statutes or Ordinances Dealing with Disorderly Persons or Conduct*, 12 A.L.R.3D 1448, 1448-56 (1967) (discussing how vague language has been used in ordinances dealing with so-called "disorderly" persons or conduct).

14. *Papachristou*, 405 U.S. at 169 (stating that a direction by a legislature to the police to arrest all "suspicious" persons would not pass constitutional muster, for a vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest (citing People v. Moss, 131 N.E. 2d 717 (N.Y. 1956))).

While judicial attitudes on vagrancy and loitering laws have evolved over time, local officials still perceive that invalidation of these laws is analogous to a dangerous assault on their authority to enforce social order.[15] Nevertheless, using the police to arrest and harass homeless individuals has been called futile and counter-productive because this approach merely removes homeless individuals from the streets or parks for a short time.[16] Courts will, however, continue to react to legislation aimed at terrorizing the homeless by declaring such laws unconstitutional whenever local governments do not voluntarily stop the enforcement of such legislation; Chapter 1102 might be the target of such judicial scrutiny in the future.[17]

*Joseph A. Tommasino*

## Crimes; vandalism and graffiti—possession of equipment

Penal Code § 594.2 (amended).
SB 583 (Lewis); 1994 STAT. Ch. 911

Existing law prohibits the possession[1] of certain items for the purpose of committing graffiti or vandalism.[2] Chapter 911 adds aerosol paint containers, felt

15. Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From American Cities*, 66 TUL. L. REV. 631, 645 (1992); *see id.* at 647 (asserting that with the invalidation of vagrancy and loitering laws, cities have adopted two novel methods to convey a message to the homeless that such people are not welcome in communities: (1) Local authorities have conducted homeless arrest sweeps and campaigns, usually on charges of camping on public land or sleeping in public; and (2) cities have engaged in "property sweeps" to seize and destroy the possessions of the homeless).

16. Baker, *supra* note 8, at 464; *see id.* (stating that solutions to the problem of homelessness are necessarily long-term and involve greater expenditures for education, public housing, mental health facilities, and drug abuse treatment centers); *id.* (adding that short-term solutions are also required, such as the humane distribution of adequate food, shelter, and medical treatment).

17. *Id.*

1. *See* People v. Gory, 28 Cal. 2d 450, 454-55, 170 P.2d 433, 436-37 (1946) (ruling that possession meant an individual had exclusive and immediate dominion and control over an item with knowledge of the forbidden item's presence); *see also* CAL. EVID. CODE § 637 (West 1966) (stating that items which are possessed are presumed to be owned by the possessor). *But cf.* People v. King, 22 Cal. 3d 12, 24, 582 P.2d 1000, 1007, 148 Cal. Rptr. 409, 416 (1978) (finding that a felon's unplanned possession and use of a firearm for self-defense purposes during a period of apparent necessity did not constitute possession as defined by California Penal Code § 12021).

2. CAL. PENAL CODE § 594.2 (amended by Chapter 911); *see id.* §§ 640.5(f), 640.6(f) (West Supp. 1994) (noting that for the purposes of these sections, graffiti means any type of inscription, painting, or writing not authorized); *see also id.* § 594.2(a) (amended by Chapter 911) (providing that the possession of a masonry, glass, or carbide drill bit, glass cutter, grinding stone, awl, chisel, or carbide scribe for the purpose of committing graffiti or vandalism is a misdemeanor); *id.* § 594.2(b) (amended by Chapter 911) (authorizing a court to assign to a defendant a maximum of 90 hours of community service as a probationary condition); *see*

tip markers, and any other marking substance[3] to the list of already prohibited instruments.[4]

INTERPRETIVE COMMENT

Chapter 911 expands a section created by the 1993 California Graffiti Omnibus Bill,[5] legislation that was intended to strengthen the then existing graffiti and vandalism laws.[6] Chapter 911 is designed to further assist law enforcement agencies in their attempts to prevent unlawful graffiti throughout the state of California.[7]

*Sean P. Lafferty*

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*also id.* § 594(a)(1)-(3) (West Supp. 1994) (stating that persons who maliciously damage, destroy, spray, scratch, write on, or otherwise deface property not owned by them are guilty of vandalism); *id.* § 594(b)(1)-(4) (West Supp. 1994) (providing that misdemeanor vandalism consists of property damage worth less than $5000, while felony vandalism must be over $5000); *id.* § 594(c) (West Supp. 1994) (permitting the court to order a defendant convicted of writing graffiti to repair, clean, or pay another to repair or clean the damaged property). *See generally* D.E. Evins, Annotation, *What Constitutes "Vandalism" or "Malicious Mischief" Within Coverage of Property Insurance Policy*, 23 A.L.R. 3D 1259, 1261 (1969 & Supp. 1994) (listing cases that demonstrate and explain jurisdictional definitions of vandalism).

3. *See* CAL. PENAL CODE § 594.2(c)(2) (amended by Chapter 911) (defining a marking substance as any item that could be used to draw, etch, mark, paint, or spray, but excluding felt tip markers and aerosol paint containers); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 583, at 2 (June 28, 1994) (describing what constitutes a marking substance).

4. CAL. PENAL CODE § 594.2(a) (amended by Chapter 911); *see id.* § 594.2(c)(1) (amended by Chapter 911) (describing a felt tip marker as either a pen tip with a width in excess of three-eighths of one inch, or any similar item which contains non water soluble ink); *see also id.* § 594.1(a) (West Supp. 1994) (prohibiting the sale, giving, or furnishing to a person under 18 years of age an aerosol paint container capable of defacing property); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 583, at 2 (June 28, 1994) (defining what constitutes a felt tip marker).

5. *See* 1993 Cal. Legis. Serv. ch. 605, sec. 6, at 2629 (enacting CAL. PENAL CODE § 594.2) (including this provision within the California Graffiti Omnibus Bill); Frederick S. Gutierrez, Review of Selected 1993 Legislation, *Crimes; Graffiti*, 25 PAC. L.J. 368, 542 (1994) (discussing the California Graffiti Omnibus Bill).

6. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 583, at 2 (June 28, 1994) (stating that although 1993's Chapter 605 was the most comprehensive legislation yet created to deal with vandalism and graffiti, California Penal Code § 594.2 was not as expansive as it needed to be).

7. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 583, at 2 (June 28, 1994); *see id.* (stating that Chapter 911 is directed at the unlawful use of aerosol paint containers and felt tip markers because prior law did not yet address these commonly used graffiti tools); *see also* Nicholas Riccardi, *7 Arrested in $100,000 Freeway Tagging Spree*, L.A. TIMES, June 22, 1994, at B1 (discussing a police task-force's attempts to combat graffiti vandalism and the 25,000 instances of graffiti which took place within a five day period).

## Crimes; vehicles—alarm systems

Penal Code § 446.9 (new); Vehicle Code § 28085 (amended).
AB 2860 (Frazee); 1994 STAT. Ch. 516

Prior law required motor vehicle[1] alarm systems to be manufactured so as to activate only when the vehicle was parked.[2] Chapter 516 deletes this provision and permits a system to be designed to activate when the vehicle is in motion.[3]

Furthermore, existing law mandates that it is a misdemeanor[4] for a person to use or possess a motor vehicle master key[5] to be used in the commission of an unlawful act.[6] Chapter 516 makes it a misdemeanor for a person to possess or use a code grabbing device[7] in order to use it in the commission of an unlawful act.[8]

### INTERPRETIVE COMMENT

The law prohibiting the activation of a motor vehicle security theft alarm while the vehicle is in operation was intended to prevent confusion between the lights and alarms of ordinary vehicles and those of law enforcement and emergency vehicles.[9] However, the need to prevent confusion amongst drivers

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1. *See* CAL. VEH. CODE § 415 (West Supp. 1994) (defining motor vehicle as any self-propelled vehicle).

2. 1977 Cal. Stat. ch. 993, sec. 3, at 2982 (enacting CAL. VEH. CODE § 28085(c)); *see* CAL. VEH. CODE § 28085 (amended by Chapter 516) (providing that the alarm system may flash any of the lights permitted or required on the vehicle, sound an audible signal, but may not emit the same sound as a siren); *cf.* ARIZ. REV. STAT. ANN. § 28-954(B) (1989) (permitting motor vehicles to be equipped with an alarm system that cannot sound like a siren); ARK. CODE ANN. § 27-37-202(b)(1) (Michie Supp. 1994) (providing that a motor vehicle alarm cannot be used as a warning siren); COLO. REV. STAT. § 42-4-221(2) (1993) (prohibiting a vehicle car alarm from being used as a warning signal to other drivers); KAN. STAT. ANN. § 8-1738(b) (1991) (providing that any vehicle may be fitted with an alarm system, but may not imitate a siren); MICH. COMP. LAWS ANN. § 257.706(b) (West 1990) (allowing a vehicle to be fitted with an alarm system, but only allowing authorized emergency vehicles to have a siren); MINN. STAT. ANN. § 169.68 (West 1986) (permitting vehicles to be equipped with an alarm system, but prohibiting the use of a siren); MISS. CODE ANN. § 63-7-65(3) (1989) (prohibiting commercial vehicles from using a siren as a warning device to other drivers, but allowing sirens to be used in a vehicle alarm system); OHIO REV. CODE ANN. § 4513.21 (Anderson 1993) (permitting motor vehicles to be equipped with an alarm system, but prohibiting them from using a siren as a warning device).

3. CAL. VEH. CODE § 28085 (amended by Chapter 516).

4. *See* CAL. PENAL CODE § 17(b) (West Supp. 1994) (defining misdemeanor).

5. *See id.* § 466.5(d)(1) (West 1988) (defining motor vehicle master key as a key that will operate all the locks or ignition switches, or both the locks and ignition switches in a given group of motor vehicle locks or motor vehicle ignition switches).

6. *Id.* § 466.5(a) (West 1988).

7. *See id.* § 446.9(c) (enacted by Chapter 516) (defining code grabbing device as a device that can receive and record the coded signal sent by the transmitter of a motor vehicle security alarm system and can play back the signal to disarm the system).

8. *Id.* § 446.9(a)-(b) (enacted by Chapter 516).

9. SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF AB 2860, at 1 (July 5, 1994); *see id.* (summarizing the arguments of the California Highway Patrol); *see also* CAL. VEH. CODE § 25251.4 (West 1985) (authorizing a driver of a motor vehicle to utilize the horn and lights of a vehicle in the vehicle's theft alarm system).

gives way to the need to address the serious concerns of carjacking[10] and code grabbing.[11]

Throughout the State, people are concerned with the growing fear of carjacking and automobile thefts.[12] There is hope that by enabling a car alarm to activate during operation, and by imposing penalties against those who try to code grab, the fear of becoming a victim of automobile theft can be alleviated to some extent.[13]

*Anthony J. Enciso*

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10. *See* CAL. PENAL CODE § 215(a) (West Supp. 1994) (defining carjacking). *See generally* Anthony M. Perez & Tammy L. Samsel, Review of Selected 1993 Legislation, *Crimes, Carjacking and Drive-by Shooting-First Degree Murder,* 25 PAC. L.J. 368, 513 (1994) (providing an in-depth description of felony carjacking).

11. SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF AB 2860, at 1 (July 5, 1994). *But see* Phil Sneiderman, *Street Smart; Searching for Solutions to 'Epidemic' of Horn Honking,* L.A. TIMES, Jan. 17, 1994, at B1 (stating that the use of horns and sirens for purposes other than warning other drivers and alarms is creating a nuisance in peaceful neighborhoods).

12. Stephen Braun & Judy Pasternak, *Column One: A Nation With Peril on Its Mind,* L.A. TIMES, Feb. 13, 1994, at A1; *see id.* (describing the fear possessed by people that they will become victims of carjacking and violent crimes despite the fact that there is no evidence by the Justice Department to show that carjackings have increased); *see also* Ken Chavez, *Wilson Signs Bills Cracking Down on Crime,* SACRAMENTO BEE, Sept. 29, 1993, at A3 (relaying the Governor's attempt to combat crimes such as drive-by shootings and carjackings by signing bills with tougher penalties into law). *But see* Tom Incantalupo, *Break Ins Cause A Boom—More Americans Are Turning to Car Security Systems,* STAR TRIB., Oct. 16, 1993, at 03M (stating that despite the growing sophistication of car vehicle alarms, any one of the hundreds of antitheft devices available can be bypassed by determined professional thieves, often with simple tools).

13. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2860, at 1 (May 12, 1994); *see id.* (indicating further that the committee was not clear as to how an auto alarm system intended to prevent carjacking and code grabbing could not be designed to conform to existing law); *see also* George E. Curry, *For Auto Thieves, N.Y. Borough Is the Perfect Locale,* CHI. TRIB., Nov. 22, 1989, at M5 (revealing that vehicle theft is the fastest growing segment of property crimes according to the National Automobile Theft Bureau); Julio Moran, *Police Arrest Four in Alleged Car Theft Ring,* L.A. TIMES, Sept. 8, 1993, at B1 (reporting on the prominence of illegal chop shops that steal cars for resale in Mexico); Pierre Thomas, *Beyond Grief and Fear is Crime's Bottom Line, Consequences Put Financial Burden on U.S.,* WASH. POST, July 5, 1994, at A1 (indicating that insurance fraud and auto theft costs the United States over $28 billion, with $0.10 of every dollar going to cover crime costs).

## Crimes; vehicular manslaughter—revision of standards for teen drivers

Penal Code §§ 191.5, 192 (amended).
AB 321 (Connolly); 1994 STAT. Ch. 71

Under existing law, a person may be convicted of vehicular manslaughter[1] if he or she causes death while driving under the influence of alcohol with a blood-alcohol content (BAC) level of 0.08% or more, by weight.[2] Existing law also

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1. *See* CAL. PENAL CODE § 192(c)(3) (amended by Chapter 71) (defining vehicular manslaughter as the killing of another while driving a vehicle in violation of California Vehicle Code §§ 23152 or 23153); CAL. VEH. CODE § 23152 (West Supp. 1994) (providing that it is unlawful for any person to drive a vehicle under the influence of alcohol, drugs, or with 0.08%, or more, of alcohol in his or her blood); *id.* § 23153 (West Supp. 1994) (stating that it is illegal for anyone under the influence of alcohol, drugs, or with a blood-alcohol level of 0.08%, or more, to drive a vehicle and simultaneously do any other unlawful act which proximately causes physical injury to those other than the driver); *see also* CAL. PENAL CODE § 192(c) (amended by Chapter 71) (describing circumstances that will prompt vehicular manslaughter charges, such as the unlawful killing of a person without malice while driving a vehicle either in the commission of an unlawful act or while under the influence of alcohol or a drug); People v. Durkin, 205 Cal. App. 3d Supp. 9, 12, 252 Cal. Rptr. 735, 737 (1988) (stating that in proving vehicular manslaughter, the prosecutor must show that the defendant's act was inherently dangerous to others such that it either constituted a misdemeanor or that it was a lawful act that was committed so negligently as to possibly take a life); *cf.* GA. CODE ANN. § 40-6-393 (Supp. 1993) (defining the offense of homicide by vehicle); N.M. STAT. ANN. § 66-8-101(C) (Michie Supp. 1994) (punishing vehicular homicide while under the influence of intoxicating liquor or drugs as a third degree felony); N.Y. PENAL LAW § 125.12(2) (Consol. Supp. 1994) (describing second degree vehicular manslaughter as causing death while driving under the influence of alcohol, as defined per New York Vehicle and Traffic Law § 1192(2)-(4)); 75 PA. CONS. STAT. § 3735 (Supp. 1994) (explaining that those in violation of laws pertaining to driving under the influence of alcohol resulting in death are guilty of a third degree felony).

2. CAL. PENAL CODE § 192(c)(3) (amended by Chapter 71); *see also* CAL. VEH. CODE § 23155(a)(3) (West Supp. 1994) (citing the presumption that those with 0.08% alcohol in their blood at the time of chemical testing were under the influence of alcohol at the time of the offense); Burg v. Municipal Court, 35 Cal. 3d 257, 263, 673 P.2d 732, 735, 198 Cal. Rptr. 145, 147 (1983) (stating that research on the effects of alcohol upon a person's physical and mental skills demonstrated that concentrations as low as 0.05% could impair one's judgement and abilities), *cert. denied and appeal dismissed*, 466 U.S. 967 (1984); People v. Cortes, 214 Cal. App. 3d Supp. 12, 15, 263 Cal. Rptr. 113, 114 (1989) (defining a person under the influence of alcohol as one whose physical or mental state is impaired to the point that he or she will not be able to operate a vehicle as safely as a sober person under similar conditions); People v. Randolph, 213 Cal. App. 3d Supp. 1, 5 n.1, 262 Cal. Rptr. 378, 380 n.1 (1989) (describing blood-alcohol level as the percent, by weight, of alcohol in an individual's bloodstream as determined through a blood, breath, or urine test); *cf.* GA. CODE ANN. § 40-6-391(a)(4), (k) (Supp. 1993) (establishing the maximum level of alcohol allowed in an adult person's blood as 0.10% and those under 18 years of age as 0.04%); ILL. COMP. STAT. ANN. ch. 625, 5/11-501(a)(1) (Smith-Hurd Supp. 1994) (providing that it is unlawful for any person to drive or control a vehicle with 0.10% blood or breath alcohol concentration); N.Y. VEH. & TRAF. LAW § 1192(2) (Consol. Supp. 1994) (listing the maximum acceptable blood-alcohol level for all persons at 0.10%); VT. STAT. ANN. tit. 23, § 1216(a) (Supp. 1993) (prohibiting those under 18 years of age from having an alcohol concentration of 0.02% in their blood); VA. CODE ANN. §§ 18.2-266, 18.2-266.1 (Michie Supp. 1995) (lowering the blood-alcohol level for those over 21 from 0.10% to 0.08%, and making it illegal for those under 21 to have a BAC level of 0.02%, or more). *See generally* Christopher H. Hall, *Validity, Construction, and Application of Statutes Directly Proscribing Driving with Blood-Alcohol Level in Excess of Established Percentage*, 54 A.L.R. 4TH 149 (1987) (discussing case law dealing with per se blood-alcohol offense statutes); Randy R. Koenders, *Alcohol-Related Vehicular Homicide: Nature and Elements of Offense*, 64 A.L.R. 4TH 166 (1988) (reporting case law authority for alcohol related vehicular manslaughter).

provides for gross vehicular manslaughter charges if the driver's conduct was grossly negligent, as well.[3]

Under Chapter 71, persons under the age of eighteen who have a BAC level of 0.05%[4] or more, also may be charged with vehicular or gross vehicular manslaughter.[5]

INTERPRETIVE COMMENT

Chapter 71 revises vehicular and gross vehicular manslaughter standards by lowering the maximum BAC level required for those under eighteen years of age to be convicted in accordance with the maximum level allowed for lawful operation of a vehicle.[6] The law was amended to address the disparity between state laws that prohibited those under the age of eighteen from driving a vehicle with a BAC level of 0.05% or more, but did not authorize vehicular manslaughter charges unless the teen driver was at the adult minimal BAC level of 0.08%.[7]

Proponents of Chapter 71 were motivated by statistics demonstrating that teenage drivers are at a greater risk than adults to be involved in a fatal crash when driving with a low BAC level, and also showing that fifteen to twenty-year-olds were significantly more likely to die in alcohol-related traffic accidents than those over twenty-one.[8] Furthermore, the fact that those under eighteen years of

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3. CAL. PENAL CODE § 191.5(a) (amended by Chapter 71); *see id.* (defining gross vehicular manslaughter as the unlawful killing of another while driving intoxicated yet without malice aforethought and in violation of the California Vehicle Code §§ 23140, 23152, 23153, with the death proximately caused by a non-felonious unlawful act done with gross negligence, or a lawful act done in an unlawful manner with gross negligence so as to possibly cause death); *see also* People v. Costa, 40 Cal. 2d 160, 166, 252 P.2d 1, 5 (1953) (describing gross negligence as the exercise of such a slight degree of care that it raises the presumption of a reckless disregard of the consequences); People v. Hansen, 10 Cal. App. 4th 1065, 1072, 12 Cal. Rptr. 2d 884, 888 (1992) (defining gross vehicular manslaughter while driving intoxicated and in violation of California Vehicle Code § 23152 as the illegal killing of another absent malice aforethought); People v. Von Staden, 195 Cal. App. 3d 1423, 1427, 241 Cal. Rptr. 523 (1987) (stating that gross negligence is to be determined by viewing all the circumstances surrounding the accused's intoxication, manner of driving, and general conduct relevant to the death).

4. *See* CAL. VEH. CODE § 23140 (West 1993) (prohibiting those under 18 years of age to drive a vehicle with 0.05%, or more, of alcohol in their blood).

5. CAL. PENAL CODE § 191.5(a) (amended by Chapter 71); *see id.* (including California Vehicle Code § 23140 within California Penal Code § 191.5); *id.* § 192(c)(3) (amended by Chapter 71) (adding California Vehicle Code § 23140 to California Penal Code § 192).

6. CAL. PENAL CODE §§ 191.5(a), 192(c)(3) (amended by Chapter 71).

7. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 321, at 2 (May 10, 1994); *see id.* (stating that AB 321 would revise California Penal Code §§ 191.5 and 192 to include § 23140 of the California Vehicle Code, after acknowledging that under existing law a teen could be over the 0.05% legal threshold and yet not be charged with either manslaughter statute if not over the adult level of 0.08%).

8. *Id.* at 3; *see id.* (citing statistics provided by the National Highway Traffic Safety Administration to Senator Quentin L. Kopp on April 13, 1993, which stated that of the 15-20 year old age group, 43% of all deaths arose from vehicle accidents, 47% of which were alcohol related); *see also* Bruce Frankel & Lori Sharn, *Teens, Booze and Driving: A Deadly Mix*, USA TODAY, Mar. 3, 1993, at 1A (stating that of drivers aged 16-20, 33% of those killed in accidents had at least 0.10% of alcohol in their blood); *id.* (explaining that during 1990, drivers in the 16-20 year age group were more likely to die in a highway accident than any other age group); Anne Saker, *Time to End 'Social Apathy' to Teen Drinking, Novello Says*, GANNETT NEWS SERV., May 28,

age have less driving experience, are more susceptible to the effects of alcohol, and are affected by smaller amounts of alcohol than most adults were also factors that contributed to the passage of Chapter 71.[9]

While the 0.05% alcohol limitation on drivers under eighteen is not as low an alcohol level as some would desire,[10] California is still in the minority of states penalizing lower levels of blood alcohol concentration for those under the age of eighteen.[11]

*Sean P. Lafferty*

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1993, *available in* LEXIS, News Library, Curnws File (quoting former Surgeon General Antonia Novello in her description of the ease with which teens throughout the nation are able to purchase alcohol). *But see* Julie Tamaki, *Total Ban for the Under-21 Driver Urged*, L.A. TIMES, June 3, 1993 at B6 (citing a decrease in the percentage of those injured or killed by teen drunk drivers between the years of 1990 and 1992).

9. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 321, at 3 (May 10, 1994); *see id.* (citing the Committee on Moral Concerns' support for Chapter 71); *see also* Frankel & Sharn, *supra* note 8 (describing how many driver education programs are being eliminated from school curriculums and that since the 1970's there has been a 25% decline in those drivers under 18 who actually get trained); *cf. Burg*, 35 Cal. 3d at 263, 673 P.2d at 735, 198 Cal. Rptr. at 147 (citing research that found most individuals were impaired in both judgment and motor skills at a blood-alcohol level of only 0.05%, and significantly below a level where normal signs of impairment manifest themselves).

10. *See* Sean P. Murphy, *Alcohol Limit for Young Drivers Should Be Zero, Panel Says*, BOSTON GLOBE, Apr. 22, 1993, at Metro 17 (citing a national panel of law enforcement and public health specialists who stated that in most states underage drinkers are held to the typical adult blood-alcohol standard of 0.10% and that at that time only 15 states had lowered the legal blood level for a minor to be drunk; the panel urged prosecution of minors for consuming any amount of alcohol); *see also* Tamaki, *supra* note 8, at B6 (discussing support and opposition for a pending bill which would have made it illegal in California for anyone under 21 to drive with any amount of alcohol in their system).

11. Murphy, *supra* note 10, at 17; *see id.* (stating that as of April 1993 only 15 states had lowered the acceptable legal blood-alcohol level for minors below adult standards); *see also* Tamaki, *supra* note 8, at B6 (noting that Arizona, North Carolina, Oregon, Utah, and Wisconsin have set alcohol limits for teen drivers at 0.00%, while Maine, Maryland, Ohio and Vermont have a teen blood-alcohol limit of 0.02%, with Rhode Island and New Hampshire at 0.04%, California and New Mexico at 0.05%, and Georgia following with 0.06%); *cf.* VT. STAT. ANN. tit. 23, § 1216(a) (Supp. 1993) (listing the under-eighteen level to be 0.02%); VA. CODE ANN. § 18.2-266.1 (Michie Supp. 1995) (reducing the percentage of alcohol allowed in the blood-stream for those under 21 to 0.02%).

## Crimes; weapons in county jails

Penal Code § 4502 (amended).
AB 1177 (Epple); 1994 STAT. Ch. 354

Under existing law, a person incarcerated in, en route to, or in the custody of any state prison may not possess, carry, have custody of, manufacture, or attempt to manufacture any weapon.[1] Chapter 354 extends this prohibition to include county jails and road camps.[2] Under Chapter 354, a prisoner found with a weapon can face a sentence of sixteen months to three years to be served consecutively in a state prison.[3]

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1. CAL. PENAL CODE § 4502(a), (b) (amended by Chapter 354); *see id.* (listing the types of prohibited weapons to be blackjacks, slingshots, billys, sandclubs, sandbags, metal knuckles, explosive substances, fixed ammunition, dirks, daggers or sharp instruments, pistols, revolvers or other firearms or any tear gas or tear gas weapons, and applying this section to persons who are: (1) Confined at any penal institutions; (2) being conveyed to or from any penal institution; or (3) under the custody of officials, officers or employees of any penal institution); *see also* People v. Morales, 252 Cal. App. 2d 537, 539-40, 60 Cal. Rptr. 671, 673 (1967) (stating that the prohibition of possession of weapons by prisoners, as under California Penal Code § 4502, is constitutional, as it is definite and certain and therefore clearly defined), *cert. denied*, 390 U.S. 1034 (1968); People v. Wells, 68 Cal. App. 2d 476, 480-81, 156 P.2d 979, 981 (1945) (declaring that it is constitutional to deny inmates in state prisons the right to possess weapons); Christopher J. Kaeser, Review of Selected 1993 California Legislation, *Crimes; Prison Inmates—Weapons*, 25 PAC. L.J. 368, 562 (1994) (discussing the expansion of California Penal Code § 4502 to include manufacturing or attempting to manufacture the specified types of prohibited weapons); *cf.* 18 U.S.C.A. § 1791(a), (b) (West Supp. 1994) (providing that it is an offense for an inmate to furnish in violation of a statute, or for an inmate to make, possess, obtain, or attempt to make or obtain a prohibited object); *id.* § 1791(d)(1) (West Supp. 1994) (defining prohibited object as a firearm, destructive device, ammunition, weapon, any object intended to be used as a weapon, or any object that threatens the security of the prison or an individual); ALA. CODE § 13A-10-36(a)(2) (1982) (providing that a person confined in a detention facility is guilty of a first degree felony if he intentionally and unlawfully makes, obtains, or possesses any deadly weapon); ARIZ. REV. STAT. ANN. § 13-2505(A)(3), (C) (Supp. 1993) (providing that a person confined in a correctional facility or who is being moved incident to such confinement, and who knowingly makes, obtains, or possesses a deadly weapon, dangerous instrument or explosive is guilty of a class two felony); TEX. PENAL CODE ANN. § 46.11 (West 1989) (providing that any person confined in a penal institution who possesses, carries upon his person, or conceals within the institution any deadly weapon is guilty of a felony in the third degree); *see also* United States v. Fox, 845 F.2d 152, 156 (7th Cir. 1988) (holding that the intended use of a sharpened nail was immaterial to the determination of guilt for the crime of possession of a weapon by a federal inmate and the trial court did not commit error by excluding such testimony), *cert. denied*, 488 U.S. 1012 (1989); United States v. Perceval, 803 F.2d 601, 603 (10th Cir. 1986) (holding that the *mens rea* for possession of a weapon by a federal inmate under 18 U.S.C. § 1791 is knowingly). *But cf.* Dennison v. Oregon State Penitentiary, 715 P.2d 88, 89 (Or. 1986) (holding that possession by an inmate of detailed plans depicting how to make a gun was not sufficient evidence to support a conviction for attempting to manufacture a weapon).

2. CAL. PENAL CODE § 4502(c) (amended by Chapter 354); *see id.* (redefining penal institution to include state prisons, prison road camps, prison forestry camps or other prison camps, farms, county jails, or county road camps).

3. *Id.* § 4502(b) (amended by Chapter 354); *cf.* People v. Kite, 605 N.E.2d 563, 565 (Ill. 1992) (stating that although possession of a prohibited weapon by a person confined in a penal institution is a strict liability offense, an inmate so charged may assert necessity as an affirmative defense). *But cf.* People v. Johns, 581 N.E.2d 403, 406 (Ill. App. 1991) (providing three factors to consider to determine if an inmate is entitled to a necessity defense: (1) Whether the defendant is faced with a specific threat of death, forcible sexual attack, or immediate and substantial bodily injury; (2) whether there is time to complain to the authorities or if there was a history of futile prior complaints; and (3) whether there exists time or opportunity to resort to the courts), *appeal denied*, 587 N.E.2d 1020 (1992), *aff'd sub nom.* People v. Levin, 623 N.E.2d 317 (1993).

INTERPRETIVE COMMENT

Chapter 354 was enacted to provide county personnel with additional protections under a specific statute when prosecuting inmates who possess or manufacture weapons.[4] Prior to the passage of Chapter 354, county prisoners with weapons were prosecuted under a more general prohibition which made the possession or manufacture of specified deadly weapons illegal.[5] Prosecution under that statute carried a maximum penalty of one year in either county jail or state prison.[6]

*Chris J. Ore*

4. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1177, at 2 (Mar. 1, 1994).

5. CAL. PENAL CODE § 12020 (West Supp. 1994); *see id.* (providing that it is a felony for any person, other than specified state officers, to possess, manufacture, or attempt to manufacture certain specified weapons).

6. *Id.* § 12020 (a) (West Supp. 1994).